

7-19-90

Vol. 55

No. 139

# federal register

---

Thursday  
July 19, 1990

---

United States  
Government  
Printing Office

SUPERINTENDENT  
OF DOCUMENTS  
Washington, DC 20402

OFFICIAL BUSINESS  
Penalty for private use, \$300

SECOND CLASS NEWSPAPER

Postage and Fees Paid  
U.S. Government Printing Office  
(ISSN 0097-6326)

1877

1877

1877





**FEDERAL REGISTER** Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

The Federal Register provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders and Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress and other Federal agency documents of public interest. Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless earlier filing is requested by the issuing agency.

The seal of the National Archives and Records Administration authenticates this issue of the Federal Register as the official serial publication established under the Federal Register Act. 44 U.S.C. 1507 provides that the contents of the Federal Register shall be judicially noticed.

The Federal Register will be furnished by mail to subscribers for \$340 per year in paper form; \$195 per year in microfiche form; or \$37,500 per year for the magnetic tape. Six-month subscriptions are also available at one-half the annual rate. The charge for individual copies in paper or microfiche form is \$1.50 for each issue, or \$1.50 for each group of pages as actually bound, or \$175.00 per magnetic tape. Remit check or money order, made payable to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or charge to your GPO Deposit Account or VISA or Mastercard.

There are no restrictions on the republication of material appearing in the Federal Register.

**How To Cite This Publication:** Use the volume number and the page number. Example: 55 FR 12345.

---

## SUBSCRIPTIONS AND COPIES

---

### PUBLIC

#### Subscriptions:

Paper or fiche	202-763-3238
Magnetic tapes	275-3328
Problems with public subscriptions	275-3054

#### Single copies/back copies:

Paper or fiche	763-3238
Magnetic tapes	275-3328
Problems with public single copies	275-3050

### FEDERAL AGENCIES

#### Subscriptions:

Paper or fiche	523-5240
Magnetic tapes	275-3328
Problems with Federal agency subscriptions	523-5240

For other telephone numbers, see the Reader Aids section at the end of this issue.

# Contents

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

## Agricultural Marketing Service

### RULES

Pork promotion, research, and consumer information, 29340

## Agriculture Department

See also Agricultural Marketing Service; Forest Service; Soil Conservation Service

### NOTICES

Agency information collection activities under OMB review, 29392

## Antitrust Division

### NOTICES

National cooperative research notifications:

Appliance Industry-Government CFC Replacement Consortium, Inc., 29432

Petroleum Environmental Research Forum, 29431, 29432 (3 documents)

Portland Cement Association, 29432

## Army Department

See Engineers Corps

## Arts and Humanities, National Foundation

See National Foundation on the Arts and the Humanities

## Bonneville Power Administration

### NOTICES

Environmental statements; availability, etc.:

IP-PF rate link extension, 29402

Pacific Northwest Coordination Agreement and Canadian Entitlement Allocation Agreement, 29400

## Coast Guard

### PROPOSED RULES

Drawbridge operations:

Florida, 29388

## Commerce Department

See also Export Administration Bureau; International Trade Administration; National Oceanic and Atmospheric Administration

### NOTICES

Agency information collection activities under OMB review, 29393, 29394 (2 documents)

## Defense Department

See Engineers Corps

## Education Department

### NOTICES

Grants and cooperative agreements; availability, etc.:

Library services programs; correction, 29453

## Employment and Training Administration

### RULES

Alien temporary employment labor certification process: "Fifty-percent rule", 29356

## Employment Policy, National Commission

See National Commission for Employment Policy

## Energy Department

See also Bonneville Power Administration; Energy Information Administration; Federal Energy Regulatory Commission

### NOTICES

Grant and cooperative agreement awards:

Rensselaer Polytechnic Institute, 29402

Natural gas exportation and importation:

Louis Dreyfus Energy Corp., 29407

## Energy Information Administration

### NOTICES

Agency information collection activities under OMB review, 29406

## Engineers Corps

### NOTICES

Environmental statements; availability, etc.:

Pacific Northwest Coordination Agreement and Canadian Entitlement Allocation Agreement, 29400

## Environmental Protection Agency

### RULES

Hazardous waste:

Identification and listing—

Exclusions, 29359

### NOTICES

Toxic and hazardous substances control:

Chemical testing—

Data receipt, 29411

## Export Administration Bureau

### NOTICES

Meetings:

Semiconductor Technical Advisory Committee, 29394

## Federal Aviation Administration

### RULES

Air carrier certification and operations:

Public address and crewmember intercom systems; CFR correction, 29352

Air traffic operating flight rules:

Nighttime VFR weather minimums, 29552

Airworthiness directives:

American Champion Aircraft, 29344

Beech, 29345

Boeing, 29342, 29347

(2 documents)

British Aerospace, 29348

Fairchild, 29349, 29350

(2 documents)

McDonnell Douglas; correction, 29351

### PROPOSED RULES

Airworthiness directives:

Boeing, 29378-29385

(6 documents)

British Aerospace, 29387

## Federal Communications Commission

### RULES

Radio stations; table of assignments:

Nebraska, 29361

South Carolina, 29361

#### PROPOSED RULES

Radio stations; table of assignments:

New Mexico, 29390

Oregon, 29391

#### NOTICES

Senior Executive Service:

Executive Resources and Performance Review Board;  
membership, 29411

#### Federal Election Commission

##### NOTICES

Meetings; Sunshine Act, 29451

#### Federal Emergency Management Agency

##### PROPOSED RULES

Flood insurance program:

Map revisions; projects review, reimbursement  
procedures, 29389

##### NOTICES

Disaster and emergency areas:

Illinois, 29411, 29412

(2 documents)

Iowa, 29412

Nebraska, 29412

Texas, 29412

Radiological emergency; State plans:

Alabama, 29412

#### Federal Energy Regulatory Commission

##### RULES

Electric utilities (Federal Power Act):

Generic determination of rate of return on common equity  
for public utilities, 29352

##### NOTICES

*Applications, hearings, determinations, etc.:*

Ford Motor Co. et al., 29407

Llano, Inc., 29409

Magnolia Pipeline Co., 29409

National Fuel Gas Supply Corp., 29410

Northwest Pipeline Corp., 29410

TPC Transmission, Inc., 29410

#### Federal Highway Administration

##### NOTICES

Environmental statements; notice of intent:

Edgecombe and Martin Counties, NC, 29449

#### Federal Maritime Commission

##### NOTICES

Agreements; additional information requests:

Reefer Express Lines, Pty., Ltd., et al., 29413

Agreements filed, etc., 29413

(2 documents)

#### Federal Reserve System

##### NOTICES

Meetings; Sunshine Act, 29451

*Applications, hearings, determinations, etc.:*

Banco Bilbao Vizcaya, S.A., 29414

Bank of Montreal, 29415

Bonduel Bancorp, Inc., et al., 29415

Community Bank Corp. et al., 29414

Compagnie Financiere de Suez et al., 29416

Deutsche Bank AG, 29416

Johnson International Bankcorp, Ltd., 29414

Kipper, David H., et al., 29419

Trans Financial Bancorp, Inc., et al., 29419

United Nebraska Financial Co. et al., 29419

#### Federal Retirement Thrift Investment Board

##### NOTICES

Meetings; Sunshine Act, 29451

#### Federal Trade Commission

##### NOTICES

Prohibited trade practices:

E-Z-EM, Inc., et al., 29420

#### Fish and Wildlife Service

##### RULES

Endangered and threatened species:

Southern San Joaquin Valley, CA; California jewelflower,  
etc., 29361

##### NOTICES

Environmental statements; availability, etc.:

Klamath River Restoration Program, CA and OR;  
hearings, 29431

#### Food and Drug Administration

##### PROPOSED RULES

Food for human consumption:

Food labeling—

Cholesterol free, low cholesterol, and reduced  
cholesterol; definitions, 29456

Nutrition labeling, mandatory status; and nutrient  
content revision, 29487

Reference daily intakes and daily reference values,  
29476

Serving sizes, 29517

Human drugs:

Antifungal products, topical (OTC); diaper rash products

Correction, 29453

##### NOTICES

Human drugs:

Export applications—

Cyanocobalamin injection; correction, 29453

#### Forest Service

##### NOTICES

Environmental statements; availability, etc.:

Routt National Forest, CO, 29392

#### Health and Human Services Department

See Food and Drug Administration

#### Immigration and Naturalization Service

##### RULES

INS/Executive Office for Immigration Review fee schedule,  
29342

#### Indian Affairs Bureau

##### NOTICES

Grants and cooperative agreements; availability, etc.:

Handicapped Indian infants and toddlers and their  
families; early intervention services, 29425

Indian tribes, acknowledgment of existence determinations,  
etc.:

Miami Nation of Indians of the State of Indiana, Inc.,  
29423

#### Interior Department

See Fish and Wildlife Service; Indian Affairs Bureau; Land  
Management Bureau; Reclamation Bureau; Surface  
Mining Reclamation and Enforcement Office

**International Trade Administration****NOTICES****Antidumping:**

Cellular mobile telephones and subassemblies from Japan, 29394

Export trade certificates of review, 29398

**Short supply determinations:**

Hot-rolled D6A alloy steel strip, 29398

**Justice Department**

See also Antitrust Division; Immigration and Naturalization Service

**NOTICES****Pollution control; consent judgments:**

Ashland Ethanol, Inc., et al., 29433

Colorado Refining Co., 29433

G. Heileman Brewing Co., 29434

Golden Gate Petroleum Co., 29434

Montrose Chemical Corp. of California et al., 29434

**Labor Department**

See Employment and Training Administration

**Land Management Bureau****RULES****Public land orders:**

Alaska, 29360

**NOTICES****Alaska Native claims selection:**

Bethel Native Corp., 29426

**Closure of public lands:**

California, 29428

**Environmental statements; availability, etc.:**

White River Resource Area, CO; nahcolite solution mine/sodium bicarbonate production plant, 29428

**Meetings:**

Safford District Advisory Council, 29426

**Realty actions; sales, leases, etc.:**

California, 29427

California; correction, 29428

Utah, 29429, 29430

(2 documents)

Wyoming, 29428

**Resource management plans, etc.:**

Dunn County, ND, 29427

Price River Resource Area, UT, 29430

**National Commission for Employment Policy****NOTICES**

Meetings, 29435

**National Foundation on the Arts and the Humanities****NOTICES****Meetings:**

Arts National Council, 29435

(2 documents)

**National Oceanic and Atmospheric Administration****RULES****Fishery conservation and management:**

Gulf of Mexico and South Atlantic coastal migratory pelagic resources, 29370

**NOTICES****Meetings:**

Mid-Atlantic Fishery Management Council, 29399

South Atlantic Fishery Management Council, 29400

**Permits:**

Marine mammals, 29399

**Nuclear Regulatory Commission****PROPOSED RULES****Byproduct material; medical use:**

Basic quality assurance program; records and reports of misadministrations or events

Nuclear medicine aspects; workshop, 29378

**Personnel Management Office****RULES****Employment:**

Career and career-conditional employment; probationary employee's appeal rights to Merit Systems Protection Board, 29339

**Retirement:**

Civil Service Retirement Spouse Equity Act; implementation, 29339

**Public Health Service**

See Food and Drug Administration

**Reclamation Bureau****NOTICES****Environmental statements; availability, etc.:**

Pacific Northwest Coordination Agreement and Canadian Entitlement Allocation Agreement, 29400

**Securities and Exchange Commission****NOTICES**

Meetings; Sunshine Act, 29451

**Self-regulatory organizations; proposed rule changes:**

Municipal Securities Rulemaking Board, 29436

National Association of Securities Dealers, Inc., 29446

**Applications, hearings, determinations, etc.:**

Alliance Strategic Multi-Market Trust, Inc., 29447

Litas International, Inc., 29448

**Small Business Administration****NOTICES****Disaster loan areas:**

Iowa, 29448

Ohio, 29448

Oklahoma, 29448

**Organization, functions, and authority delegations:**

General Counsel et al.; order of succession, 29449

**Soil Conservation Service****NOTICES****Environmental statements; availability, etc.:**

Middle Tangipahoa Watershed, LA, 29393

**Surface Mining Reclamation and Enforcement Office****RULES****Permits and coal exploration systems:**

Federal program States, Federal lands, and Indian lands; application fee collection, etc., 29536

**Thrift Supervision Office****RULES****Operations:**

Loan to one borrower limitations

Correction, 29453

**NOTICES****Conservator appointments:**

Capital-Union Federal Savings Association, 29450

North Texas Federal Savings Association, 29450

Progressive Savings Bank, F.S.B., 29450

Summit First Savings & Loan Association, F.A., 29450

**Receiver appointments:**

Capital-Union Savings, F.A., 29450  
 North Texas Federal Savings & Loan Association, 29450  
 Progressive Federal Savings Bank, 29450  
 Summit First Federal Savings & Loan Association, 29450

**Transportation Department**

See Coast Guard; Federal Aviation Administration; Federal Highway Administration

**Treasury Department**

See also Thrift Supervision Office

**NOTICES**

Agency information collection activities under OMB review, 29449

**Separate Parts In This Issue****Part II**

Department of Health and Human Services, Food and Drug Administration, 29456

**Part III**

Department of Health and Human Services, Food and Drug Administration, 29476

**Part IV**

Department of the Interior, Office of Surface Mining Reclamation and Enforcement, 29536

**Part V**

Department of Transportation, Federal Aviation Administration, 29552

**Reader Aids**

Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

**CFR PARTS AFFECTED IN THIS ISSUE**

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

<b>5 CFR</b>	<b>40 CFR</b>
315..... 29339	261..... 29359
831..... 29339	<b>43 CFR</b>
<b>7 CFR</b>	Public Land Orders:
1230..... 39340	5180 (Amended by
<b>8 CFR</b>	PLO 6787)..... 29360
103..... 29342	5184 (Amended by
299..... 29342	PLO 6787)..... 29360
<b>10 CFR</b>	6787..... 29360
Proposed Rules:	<b>44 CFR</b>
35..... 29378	Proposed Rules:
<b>12 CFR</b>	72..... 29389
563..... 29453	<b>47 CFR</b>
<b>14 CFR</b>	73 (2 documents)..... 29361
39 (8 documents)..... 29342-29351	Proposed Rules:
91..... 29552	73 (2 documents)..... 29390, 29391
135..... 29352	<b>50 CFR</b>
Proposed Rules:	17..... 29361
39 (7 documents)..... 29378-29387	642..... 29370
<b>18 CFR</b>	
37..... 29352	
<b>20 CFR</b>	
655..... 29356	
<b>21 CFR</b>	
Proposed Rules:	
101 (4 documents)..... 29456-29517	
104..... 29476	
105..... 29487	
333..... 29453	
<b>30 CFR</b>	
736..... 29536	
750..... 29536	
<b>33 CFR</b>	
Proposed Rules:	
117..... 29388	

# Rules and Regulations

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 315

#### Career and Career-Conditional Employment

**AGENCY:** Office of Personnel Management.

**ACTION:** Final regulations.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a technical amendment to update outdated language in its regulations pertaining to the appeal rights of probationers. The new regulations would expand one of the factors upon which an employee may base an appeal.

**EFFECTIVE DATE:** August 20, 1990.

**FOR FURTHER INFORMATION CONTACT:** Raleigh M. Neville, (202) 606-0960.

**SUPPLEMENTARY INFORMATION:** On January 24, 1990, OPM published (at 55 FR 2383) proposed regulations to amend the language in 5 CFR part 315 governing the appeal rights of probationers. For many years, these regulations had given a probationer a limited right to appeal a termination which the employee alleged was based on discrimination because of several factors, including physical handicap. However, the term "physical handicap" is too narrow in view of the broader coverage now accorded in law and regulations to individuals with disabilities. OPM, therefore, proposed changing the term "physical handicap" to "handicapping condition."

We received comments from two agencies and one union, none of which offered any objection to the change. One agency suggested that we provide examples of a "handicapping condition" and/or a reference for the definition of this term. As a result, we have included a sentence in the final regulation, pointing out that handicapping condition means someone who is considered a

"handicapped person" under § 1613.702(a) of title 29, Code of Federal Regulations, issued by the Equal Employment Opportunity Commission.

#### E.O. 12291 Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects Federal employees.

#### List of Subjects in Parts 315 and 316

Government employees.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM is amending part 315 of title 5, Code of Federal Regulations, as follows:

### PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

1. The authority citation for part 315 is revised to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; §§ 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652; §§ 315.602 and 315.604 also issued under 5 U.S.C. 8151, Pub. L. 93-418; § 315.605 also issued under E.O. 12034, 43 FR 1917, Jan 13, 1978; § 315.606 also issued under E.O. 11219, 3 CFR 1964-1965 Comp., p. 303; § 315.607 also issued under 22 U.S.C. 2506, 93 Stat. 371, E.O. 12137, 22 U.S.C. 2506, 94 Stat. 2158; § 315.608 also issued under E.O. 12362, 47 FR 21231; § 315.610 also issued under 5 U.S.C. 3304(d), Pub. L. 99-586; § 315.710 also issued under E.O. 12596, 52 FR 17537; Subpart I also issued under 5 U.S.C. 3321, E.O. 12107.

2. Section 315.806(d) is revised to read as follows:

#### § 315.806 Appeal rights to the Merit Systems Protection Board.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination because of race, color, religion, sex, or national origin; or age (provided that at the time of the alleged discriminatory action the employee was at least 40 years of age); or handicapping condition if the individual meets the definition of "handicapped

person" as set forth in regulations of the Equal Employment Opportunity Commission at 29 CFR 1613.702(a). An appeal alleging a discriminatory termination may be filed under this subsection only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.

[FR Doc. 90-16890 Filed 7-18-90; 8:45 am]

BILLING CODE 6325-01-M

### 5 CFR Part 831

RIN 3206-AB75

#### Civil Service Retirement System; Civil Service Retirement Spouse Equity Act; Implementation

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is amending its interim rules implementing the Civil Service Retirement Spouse Equity Act of 1984, as amended (CSRSEA). The interim rules regulate survivor elections, survivor annuities based on those elections, special survivor annuities for former spouses under CSRSEA, survivor annuities payable to widows and children, lump-sum death benefits, court orders affecting retirement benefits, and refunds of civil service retirement contributions. These amendments to the interim rules retroactively eliminate the requirement that the former employee execute an application for a refund of retirement deductions before a notary public. This change is necessary to prevent placing an unreasonable burden on our former employees and to avoid delays in payment of refunds to these former employees.

**DATES:** Interim rules effective April 11, 1990; comments must be received on or before September 17, 1990.

**ADDRESSES:** Send comments to Andrea Minniear Farran, Assistant Director for Retirement and Insurance Policy, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044; or deliver to OPM, Room 4351, 1900 E Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Harold L. Siegelman, (202) 606-0777, extension 207.

**SUPPLEMENTARY INFORMATION:** On May 13, 1985, we published (at 50 FR 20064) interim regulations implementing the retirement provisions of CSRSEA, Public Law 98-615. These regulations restructured the existing regulations concerning the subjects covered by the Act, specifically civil service retirement survivor annuities, court orders affecting civil service retirement benefits, and lump-sum payments (employee refunds and lump-sum death benefits) under the Civil Service Retirement System.

On March 12, 1990, we published (at 55 FR 9093) amendments to those interim regulations. Item 23 of those amendments imposed a new requirement that a former employee applying for a refund of retirement deductions execute the application for the refund before a notary public or other official authorized to administer oaths, with the intent of preventing fraudulent statements.

We have reexamined the effects of the notarization requirement. We need to prevent false certification to the extent possible, but the notarization requirement appears not to be a reasonable solution. OPM processes 150,000 refund applications per year. The notarization requirement would require each applicant to endure the inconvenience and expense of going to a notary to execute the application. In addition, we expect that we would receive thousands of applications that have not been notarized. We would have to return those applications to be completed properly, thus delaying the payment of refunds.

To deter false certifications, the refund application contains a warning that any false statement is a violation of Federal law punishable by fine or imprisonment. In addition, we will revise the certification statement on the refund application to emphasize that the applicant is certifying that the information given pertaining to current and former spouses is true.

Under sections 553(b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. The regulations are effective on April 11, 1990, to prevent the notarization requirement from ever becoming effective. This is necessary to prevent an unreasonable burden on refund applicants and an unnecessary processing burden on OPM. Delaying

rulemaking would be contrary to the public interest.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal agencies and retirement payments to retired and former Government employees and their survivors and former spouses.

#### List of Subjects in 5 CFR Part 831

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.  
Constance Berry Newman,  
Director.

Accordingly, OPM is amending 5 CFR part 831 as follows:

#### PART 831—RETIREMENT

##### Subpart T—Payment of Lump Sums

1. The authority citation for subpart T of part 831 continues to read as follows:

Authority: 5 U.S.C. 8347.

2. In § 831.2007, paragraph (b)(2) is revised to read as follows:

§ 831.2007 Notification of current and/or former spouse before payment of lump sum.

(b) \* \* \*

(2) Applicants for payment of the lump-sum credit must certify on a form prescribed by OPM whether the applicant has a current or former spouse subject to the notification requirement.

[FR Doc. 90-16891 Filed 7-18-90; 8:45 am]

BILLING CODE 5325-01-M

#### DEPARTMENT OF AGRICULTURE

##### Agricultural Marketing Service

##### 7 CFR Part 1230

[No. LS-90-108]

##### Pork Promotion, Research, and Consumer Information

**AGENCY:** Agricultural Marketing Service; USDA.

#### **ACTION:** Interim final rule.

**SUMMARY:** This interim final rule amends regulations issued under the Pork Promotion, Research, and Consumer Information Order (Order) by revising the table which lists the Harmonized Tariff System (HTS) numbers for imported pork and pork products, to conform to changes in the HTS for imported pork and pork products implemented by U.S. Customs Service (USCS). This change will facilitate the collection of assessments due on imported pork and pork products by USCS.

**DATES:** Effective July 19, 1990. Comments must be received by August 20, 1990.

**ADDRESSES:** Send two copies of comments to Ralph L. Tapp, Chief, Marketing Programs Branch, Livestock and Seed Division, Agricultural Marketing Service, USDA, room 2624-S, P.O. Box 96456, Washington, DC 20090-6456. Comments will be available for public inspection during regular business hours at the above office in room 2624 South Building, 14th and Independence Avenue, SW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ralph L. Tapp, Chief, Marketing Programs Branch—202/382-1115.

**SUPPLEMENTARY INFORMATION:** This interim final rule has been reviewed under USDA procedures established to implement Executive Order No. 12291 and Departmental Regulation 1512-1, and is hereby classified as a non-major rule under the criteria contained therein.

This action was also reviewed under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) Many importers may be classified as small entities. This interim final rule merely (1) revises the numbers identifying imported pork and pork products listed in the table in § 1230.110 (55 FR 21848) in the regulations to conform to recent USCS changes in the HTS numbering system for imported pork and pork products. In addition, the action will not impose any requirements on importers beyond those previously discussed in the September 5, 1986, issue of the Federal Register (51 FR 31898), when it was determined that the Order would not have a significant effect upon a substantial number of small entities. The changes in the HTS numbers for imported pork and pork products is merely a technical change and will impose no new requirements on the industry. Accordingly, the Administrator of the Agricultural Marketing Service has determined that this action will not have significant

economic impact upon a substantial number of small entities.

The Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801-4819) approved December 23, 1985, authorizes the establishment of a national pork promotion, research, and consumer information program. The program is funded by an assessment of 0.25 percent of the market value of live porcine animals sold in the United States and an equivalent amount on imported live porcine animals, pork, and pork products. The final Order establishing a pork promotion, research, and consumer information program was published in the September 5, 1986, issue of the Federal Register (51 FR 31998) and assessments began on November 1, 1986. The Order requires importers of live porcine animals to pay an amount equal to 0.25 percent of their market value, and importers of pork and pork products to pay an amount which represents 0.25 percent of the value of the live porcine animals from which the pork and pork products were derived, based upon the most recent annual seven-market average price for barrows and gilts, as published by the Department. As a matter of practicality, the assessments on imported pork and pork products are expressed in cents per pound. The formula for converting the live animal equivalent of 0.25 percent of the value of the live animals to an assessment per pound is described in the supplementary information accompanying the Order and published in the September 5, 1986, issue of the Federal Register (51 FR 31901). The schedule of assessments is listed in a table in § 1230.110 of the regulations (55 FR 21848) for each type of pork and pork product identified by a HTS number.

The purpose of this interim final rule is to revise the present table found under § 1230.110 of the regulations (55 FR 21848) to reflect the most recent changes USCS has implemented in the HTS numbers for imported pork and pork products.

Those changes delete seven HTS numbers and subdivide each of the categories represented by those seven HTS numbers into two new categories and renumbers each new category. The cents per pound and per kilogram assessments are the same for the 14 new HTS numbers as they were for the corresponding deleted seven HTS numbers contained in the table in § 1230.110 (55 FR 21848). A comparison of the deleted and replacement numbers may be found in the following table:

Deleted HTS No.	New HTS No.	HTS article description.
0203.12.10009	0203.12.10107	Hams and Cuts thereof (processed).
	0203.12.10205	Shoulders and cuts thereof (processed).
0203.12.90002	0203.12.90100	Hams and Cuts thereof (other).
	0203.12.90208	Shoulders and cuts thereof (other).
0203.19.20000	0203.19.20108	Spareribs (processed).
	0203.19.20901	Other (processed).
0203.19.40005	0203.19.40104	Bellies.
	0203.19.40907	Other.
0210.11.00003	0210.11.00101	Hams and cuts thereof (bonein).
	0210.11.00209	Shoulders and cuts thereof (bonein).
		Salted, in brine, dried, or smoked.
0210.19.00005	0210.19.00103	Canadian style bacon.
	0210.19.00905	Other.
1601.00.20007	1601.00.20105	Pork, Canned.
	1601.00.20908	Pork, Other.

The other 19 HTS numbers and the per pound and per kilogram assessments listed in the table in § 1230.110 remain unchanged. These changes in the HTS numbers for imported pork and pork products do not affect the assessments on imported swine. As a result of these changes the 26 HTS numbers listed in the table in § 1230.110 of the regulations (55 FR 21848) are increased to 33 HTS numbers for imported pork and pork products.

Pursuant to 5 U.S.C. 533, it is found and determined that, upon good cause, it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register because: (1) In order to facilitate collection by USCS of the assessments on imported pork and pork products identified by the 14 new HTS numbers, which are subject to assessment under the Order (7 CFR part 1230), as authorized by the Pork Promotion, Research, Consumer Information Act of 1985 (7 U.S.C. 4801-4819), it is necessary that this interim final rule be effective upon publication in the Federal Register; (2) the changes contained in this interim final rule propose no new requirements on the industry; and (3) interested persons are afforded a 30-day comment period to submit written comments. Any comments which are received by August

20, 1990 will be considered prior to any finalization of this interim final rule.

#### List of Subjects in 7 CFR Part 1230

Administrative practice and procedure, Advertising, Agricultural research, Live porcine animal, Marketing agreement, Meat and meat products, Pork and pork products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1230 is amended as follows:

#### PART 1230—PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION

1. The authority citation for 7 CFR part 1230 continues to read as follows:

Authority: 7 U.S.C. 4801-4819.

2. Amend subpart B—Rules and Regulations, by revising § 1230.110 to read as follows:

§ 1230.110 Assessments on imported live porcine animals, pork, and pork products.

The following HTS categories of imported live porcine animals are subject to assessment at the rate specified.

Live Porcine animals	Assessment
0103.10.00004.....	0.25 percent customs entered value.
0103.91.00006.....	0.25 percent customs entered value.
0103.92.00005.....	0.25 percent customs entered value.

The following HTS categories of pork and pork products are subject to assessment at the rate specified.

Pork and pork products	Assessment	
	cents/lb.	cents/kg.
0203.11.00002.....	.16.....	.352736
0203.12.10107.....	.16.....	.352736
0203.12.10205.....	.16.....	.352736
0203.12.90100.....	.16.....	.352736
0203.12.90208.....	.16.....	.352736
0203.19.20108.....	.18.....	.396828
0203.19.20901.....	.18.....	.396828
0203.19.40104.....	.16.....	.352736
0203.19.40907.....	.16.....	.352736
0203.21.00000.....	.16.....	.352736
0203.22.10007.....	.16.....	.352736
0203.22.90000.....	.16.....	.352736
0203.29.20008.....	.18.....	.396828
0203.29.40004.....	.16.....	.352736
0206.30.00006.....	.16.....	.352736
0206.41.00003.....	.16.....	.352736
0206.49.00005.....	.16.....	.352736
0210.11.00101.....	.16.....	.352736
0210.11.00209.....	.16.....	.352736
0210.12.00208.....	.16.....	.352736
0210.12.00404.....	.16.....	.352736
0210.19.00103.....	.18.....	.396828
0210.19.00906.....	.18.....	.396828

Pork and pork products	Assessment	
	cents/lb	cents/kg
1601.00.20105.....	.22.....	.485012
1601.00.20908.....	.22.....	.485012
1602.41.20203.....	.24.....	.529104
1602.41.20409.....	.24.....	.529104
1602.41.90002.....	.16.....	.352736
1602.42.20202.....	.24.....	.529104
1602.42.20408.....	.24.....	.529104
1602.42.40002.....	.16.....	.352736
1602.49.20009.....	.22.....	.485012
1602.49.40005.....	.18.....	.396828

Done at Washington, DC on July 16, 1990.

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 90-16895 Filed 7-18-90; 8:45 am]

BILLING CODE 3410-02-M

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Parts 103 and 299

[INS No. 1254-90]

#### Immigration and Naturalization Service and Executive Office for Immigration Review; Fee Review

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the fee schedule of the Immigration and Naturalization Service and the Executive Office for Immigration Review by charging a new fee for Form I-765, Application for Employment Authorization. This change is necessary to place the financial burden of providing this special service and benefit which does not accrue to the general public at large on the recipients of this special service and benefit. The \$35.00 fee reflects the current recovery cost of providing this special service and benefit, taking into account public policy and other pertinent facts.

**EFFECTIVE DATE:** November 22, 1989.

**FOR FURTHER INFORMATION CONTACT:** Charles S. Thomason, Systems Accountant, Resource Management Branch, Immigration and Naturalization Service, 425 I Street NW., Washington, DC 20536, room 6309. Telephone: (202) 514-4705.

**SUPPLEMENTARY INFORMATION:** The Immigration and Naturalization Service, published an interim rule with request for comments, in the Federal Register on November 22, 1989, at 54 FR 48230. The Service received several comments from attorneys and service organizations. All comments received on or before

December 22, 1989, were fully considered before preparing this final rule. The following is a summary addressing the substantive comments. Several commenters suggested that the interim rule published on November 22, 1989, was not sufficiently clear as to what classes of aliens need or do not need to pay the \$35.00 fee to file the Form. Since page 3 of the form is so explicit regarding the class of aliens required to pay the fee, it was not necessary to list the class of aliens in the interim rule. Other commenters felt the fee was not warranted under any circumstances, and perhaps was not based on cost. The decision to propose and subsequently impose a fee for Form I-765 was given long and careful consideration. It is based on a Service-wide policy that beneficiaries of special services of the type provided by this rule should bear the appropriate cost. Consistent with this policy, the INS attempted as fairly and accurately as possible to ascertain the cost of providing this special service and benefit and to set the pertinent fee accordingly. To do otherwise would violate the principles of 31 U.S.C. 9701 and OMB Circular A-25, which requires Federal agencies to establish a fee system in which the special service or benefit provided to or for any person be self-sustaining to the fullest extent possible. Arguments that we violated these principles are wholly without merit. The fee structure adheres to the cost principle.

Further, since the regulations provide for the waiver of a fee when it is shown that the recipient is unable to pay, the new fee does not prohibit or burden applicants on the basis of the inability to pay as comments suggested. Furthermore, several of our fees are at less than full cost recovery recognizing longstanding public policy and interest served by these processes.

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This rule would not be a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

The information collection requirements contained in this rule have been cleared by the Office of Management and Budget under the provisions of the Paperwork Reduction Act under OMB Control number 1115-0163.

## List of Subjects

### 8 CFR Part 103

Administrative practice and procedures, Archives and records, Authority delegation, Fees, Forms.

### 8 CFR Part 299

Forms, Reporting and recordkeeping requirements.

Accordingly, under the authority of 5 U.S.C. 552, 552a, 8 U.S.C. 1101, 1103, 1201, and 1304, the interim rule amending 8 CFR parts 103 and 299 which was published at 54 FR 48230 on November 22, 1989, is adopted as a final rule without change.

Dated: July 11, 1990.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 90-16829 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-10-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 89-NM-210-AD; Amdt. 39-6673]

#### Airworthiness Directives; Boeing Model 737 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 737 series airplanes, which currently requires operational testing of the fuel boost pump bypass valves, and provides an optional terminating modification. This amendment requires a one-time inspection of the bypass valves on airplanes that have been modified, and further modification, if necessary; and modification of those airplanes that have not been modified. This amendment is prompted by reports by unacceptable preloading in the suction feed bypass system components on airplanes on which the optional modification was accomplished. This condition, if not corrected, could lead to fuel line stress fractures causing fuel leakage within the main wing tanks, which could then result in engine(s) power loss due to fuel starvation during engine(s) suction feed.

**EFFECTIVE DATE:** August 27, 1990.

**ADDRESSES:** The applicable service information may be obtained from

Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stephen S. Bray, Propulsion Branch, ANM-140S; telephone (206) 431-1989. Mailing address: FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, C-83066, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations by superseding AD 88-01-06 R1, Amendment 39-5990 (53 FR 28859, August 1, 1988), applicable to Boeing Model 737 series airplanes, to require a one-time inspection of the fuel boost pump bypass valves on airplanes that have accomplished the terminating modification provided by AD 88-01-06 R1, and further modification, if necessary; and modification of those airplanes that have not previously been modified; was published in the Federal Register on November 30, 1989 (54 FR 49300).

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

The manufacturer noted that the reference to the "fuel scavenge system" throughout the Notice is not totally correct; the proper terminology is "suction feed bypass system." The FAA concurs, and the terminology in the final rule has been revised accordingly.

The manufacturer also questioned the unsafe condition addressed by the AD, and suggested that there have been no known instances where the suction bypass kits were actually installed in a preloaded condition. Operators who experienced difficulty in installing the original kits notified Boeing and were told how to rework existing parts or were told to wait for a supplemental kit. Further, this commenter stated that the FAA makes an assumption that a preload would fracture the fuel lines completely within the main wing tanks, and this would lead to engine power loss due to fuel starvation. Cracks are not new to fuel system tubing; cracks may start small and are usually detected by an unwanted transfer of fuel between tanks. From these comments, the FAA infers that the commenter is suggesting that the proposed rule be withdrawn. The FAA does not concur. This AD

action was initiated based on reports of operators who encountered incidents of unacceptable preloading in the bypass system components (misalignment) when installing the optional modification (replacement of the fuel pump bypass valve) in accordance with the existing AD. The FAA considers that the potential exists for some airplanes to have remained in service with this modification installed. Further, the potential exists that with this kit installed, preloading in the system components could lead to fuel line stress fractures. Such fractures can be detected by unwanted transfer of fuel between the tanks; however, if the fractures are not detected and corrected, fuel leakage can occur within the main wing tanks and lead to engine power loss due to fuel starvation during engine suction feed. Based on this, the FAA has determined that an unsafe condition exists, and this AD action is justified and warranted.

The manufacturer also requested that airplanes modified with certain kits (namely, Top Kit 65C26950-11; or Top Kit 65C26950-1 and Supplemental Kit 65C26950-12) be exempt from the required operational inspections. Additionally, airplanes equipped with Top Kit 65C26950-1 installed by modification of the 69-73593 stringer bracket and/or the 69-77541-1 bypass valve tube assembly support bracket, in accordance with Boeing Telex M7272890330, dated January 18, 1989, should also be exempt from the inspection. The FAA concurs with this request, and notes that the modification kits specified by the commenter are those required to be installed by this AD action. The rule states that the required inspections and modification must be performed within the specified compliance time, " \* \* \* unless previously accomplished." Therefore, airplanes modified with the modification kits called out in the revised Boeing service bulletin require no further action in accordance with this AD.

The Air Transport Association (ATA) of America, in behalf of its members, requested an extension of the compliance time from the proposed one year to 18 months because some operators need to update their part kits. Additionally, the manufacturer requested that the compliance time be extended to the next "C" check since, in its view, the unsafe condition addressed does not warrant so short an interval as proposed. The FAA does not concur. The FAA has been advised that ample parts have been available since August 7, 1989; therefore, parts availability should not pose a problem to operators. In developing the compliance time for

this AD action, the FAA considered the number of affected airplanes, the time required to accomplish the modification, the cost and availability of the modification, and the interim safeguards. The FAA has determined that the compliance time, as proposed, represents the maximum interval of time allowable for affected airplanes to continue to operate prior to modification without compromising safety. Further, regarding the request that the compliance time be extended to the next "C" check, since maintenance schedules may vary from operator to operator, there would be no assurance that the modification would be accomplished during that time. Under the provisions of paragraph E. of the final rule, however, operators may apply for the approval of an alternate means of compliance or adjustment of the compliance time if sufficient justification is presented to the FAA.

A comment was received from a foreign operator requesting that continued use of the operational test (water purging procedure) be allowed until such time as the modification can be implemented. The FAA does not concur that the operational tests should be allowed to continue indefinitely. The degree of assurance necessary as to the adequacy of inspections needed to maintain the safety of the transport airplane fleet, coupled with a better understanding of the human factors associated with numerous repetitive inspections/tests, has caused the FAA to place less emphasis on repetitive inspections and more emphasis on design improvements and material replacement. Thus, in lieu of its previous position of continual inspection, the FAA has decided to require, whenever practicable, airplane modifications necessary to remove the source of the problem addressed. The modification requirements of this action are in consonance with that policy decision. For the reasons discussed previously, the FAA has determined that the compliance time of one year after the effective date of this AD for the modification is adequate and warranted. An operator must perform the water purging procedure, required by AD 88-01-06 R1 (paragraph A. of this AD), until the modification required by this AD is accomplished.

Paragraph E. of the final rule has been revised to specify the current procedure for submitting requests for approval of alternate means of compliance.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the

adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator, nor increase the scope of the AD.

There are approximately 500 Model 737 series airplanes of the affected design in the worldwide fleet. It is estimated that 200 airplanes of U.S. registry will be affected by this AD, that it will take approximately 19 manhours per airplane to accomplish the required actions, and that the average labor cost will be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$152,000.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by superseding AD 88-01-06 R1, Amendment 39-5990 (53 FR 28859, August 1, 1988), with the following new airworthiness directive:

Boeing: Applies to Model 737 series airplanes, as listed in Boeing Alert Service Bulletin 737-28A1072, dated August 27, 1987, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent engine fuel starvation resulting from main wing tank suction feed system stress fractures or fuel boost pump bypass valve freezing, accomplish the following:

A. Prior to the accumulation of 150 flight hours after January 27, 1988 (the effective date of Amendment 39-5823, AD 88-01-06), and thereafter at intervals not to exceed 300 flight hours, perform an operational test of the bypass valves in accordance with Boeing Alert Service Bulletin 737-28A1072, dated August 27, 1987.

B. The operational tests required by paragraph A., above, may be terminated when the fuel system modifications, detailed in Boeing Service Bulletin 737-28A1072, Revision 2, dated February 18, 1988, or Revision 3, dated October 8, 1988, are installed.

C. For airplanes modified in accordance with paragraph B., above: Within one year after the effective date of this amendment, conduct an inspection of the suction feed bypass system for preloading in accordance with Boeing Alert Service Bulletin 737-28A1072, Revision 4, dated August 7, 1989. If preloading is discovered in the suction feed bypass system, prior to further flight, modify in accordance with that service bulletin.

D. For all other airplanes: Within one year after the effective date of this amendment, modify the fuel boost pump bypass valves system in accordance with Boeing Alert Service Bulletin 737-28A1072, Revision 4, dated August 7, 1989. This modification constitutes terminating action for the repetitive operational tests required by paragraph A., above.

E. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note.—The request should be submitted directly to the Manager, Seattle ACO, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Seattle ACO.

F. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment supersedes Amendment 39-5990, AD 88-01-06 R1.

This amendment becomes effective August 27, 1990.

Issued in Seattle, Washington, on July 12, 1990.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-16879 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 90-CE-25-AD; Amdt. 39-6671]

#### Airworthiness Directives; American Champion Aircraft (Bellanca, Champion) Model 8KCAB Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This amendment adopts a new Airworthiness Directive (AD), applicable to American Champion Aircraft (Bellanca, Champion) Model 8KCAB airplanes which requires inspections of the upper wing front spar strut fittings (P/N 2-1976) for cracks. Fatigue cracks in this part have been reported which could result in the failure of the upper wing front spar strut fittings and separation of a wing. The inspections specified in the AD will detect these cracks before failure.

**DATES:** Effective Date: August 15, 1990. Compliance: As prescribed in the body of the AD.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Gregory J. Michalik, Chicago Aircraft Certification Office, 2300 East Devon Avenue, Des Plaines, Illinois 60018, Telephone: (312) 694-7135.

**SUPPLEMENTARY INFORMATION:** On June 4, 1990, the National Transportation Safety Board (NTSB) notified the FAA of a recent fatal accident involving a Bellanca Model 8KCAB airplane. The investigation by the NTSB disclosed that the airplane sustained a separation of the right wing following the failure of the front spar strut fittings (P/N 2-1976) during an acrobatic instructional flight. Metallurgical examination of the failed fittings disclosed that they failed because of fatigue cracks in both fitting side plates. The fatigue cracks initiated near the assembly welds between the flat plate and each side plate and had independently propagated upward into both the side plates until complete separation of the fittings occurred. Four other incidents of cracking near the welds in the front spar strut fittings on Bellanca Model 8KCAB airplanes have

been reported by members of the International Acrobatic Clubs. The time-in-service on the four airplanes involved in these incidents ranged from 980 hours to 2100 hours. These reports describe two typical locations for the cracks, one at the welds between the flat plate and the side plates, similar to the locations of the fatigue cracks on the accident airplane, and the other at the welds securing the reinforcement doublers at the left strut to fitting attachment bolt holes. In one instance, a fitting with a crack at the reinforcement doublers had been submitted to a private laboratory for failure analysis. The laboratory determined that the crack was caused by fatigue that initiated in a high hardness region of the weld heat affected zone.

Since the FAA has determined that the unsafe condition described herein is likely to exist or develop in other airplanes of the same type design, an AD is being issued requiring inspections for cracks in the front spar strut fitting (P/N 2-1976), and replacement, if necessary, on American Champion Aircraft (Bellanca, Champion) Model 8KCAB airplanes. Because an emergency condition exists that requires the immediate adoption of this regulation, it is found that notice and public procedure hereon are impractical and contrary to the public interest, and good cause exists for making this amendment effective in less than 30 days.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and that it is not considered major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared

and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

**American Champion Aircraft (Bellanca, Champion):** Applies to Model 8KCAB (all serial numbers) airplanes certificated in any category. Compliance: Required as indicated in the body of the AD, unless already accomplished.

To prevent failure of the upper wing front spar strut fittings (P/N 2-1976) which could result in an in-flight separation of the wing, accomplish the following:

(a) Within the next 25 hours time-in-service (TIS) after the effective date of this AD or prior to the accumulation of 500 hours TIS of the front spar strut fittings (P/N 2-1976), whichever occurs later, and thereafter at intervals not to exceed 250 hours TIS from the last inspection, accomplish the following:

(1) Remove both front spar strut fittings (P/N 2-1976) and strip all paint with a chemical stripper. Clean and prepare the fittings for a magnetic particle inspection.

(2) Conduct a magnetic particle inspection of the fittings, paying close attention to the areas near the welds.

(3) If cracks are found, prior to further flight, replace any cracked fittings with a new or serviceable fitting. (P/N 2-1976) which has been inspected and treated in accordance with the requirements of this AD.

(4) If no cracks are found, prior to further flight, clean the fittings and apply a spray coat or a dip coat of zinc chromate primer and reinstall the fittings.

(b) Operators who do not have records of hours time-in-service on individual front spar strut fittings (P/N 2-1976) shall substitute airplane hours time-in-service in lieu thereof.

(c) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(d) An alternate method of compliance or adjustment of the initial or repetitive compliance times which provides an equivalent level of safety may be approved by the Manager, Chicago Aircraft

Certification Office, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

**Note:** The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the Manager, Chicago Aircraft Certification Office.

This amendment becomes effective on August 15, 1990.

Issued in Kansas City, Missouri, on July 11, 1990.

Barry D. Clements,

Manager, Small Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. 90-16876 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 90-CE-13-AD; Amdt. 39-6667]

#### Airworthiness Directives; Beech 99 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new Airworthiness Directive (AD), applicable to certain Beech 99 Series airplanes, which supersedes AD 73-03-04 and requires reinforcement or replacement of any original style vertical stabilizer (fin) with one of improved design. The FAA has determined that long term continued operational safety should be assured by actual modification of the airframe rather than by repetitive inspections. The actions specified will preclude the loss of vertical fin integrity due to undetected fatigue cracks.

**DATES:** *Effective Date:* September 11, 1990. *Compliance:* As indicated in the body of the AD.

**ADDRESSES:** Beechcraft Service Instructions No. 0530-134, Rev. 1 dated June 1975, applicable to this AD, may be obtained from the Beech Aircraft Corporation, Commercial Service, Department 52, P.O. Box 85, Wichita, Kansas 67201-0085; Telephone (316) 681-7111, or may be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

**FOR FURTHER INFORMATION CONTACT:** Don Campbell, Aerospace Engineer, Airframe Branch, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; Telephone (316) 946-4409.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal

Aviation Regulations to include an AD requiring reinforcement or replacement of any original style vertical stabilizer (fin) with one of improved design on certain Beech 99 Series airplanes was published in the Federal Register on April 12, 1990 (55 FR 13799).

The proposal was prompted by reexamination, by the FAA, of the airworthiness issues relating to aging commuter class airplanes. Public meetings and operators data have confirmed that airplanes of this class are being operated well beyond the times envisioned at the time of design and manufacture. Considering the experience gained in the transport industry, the FAA has determined that preventative action must be taken with the aging commuter fleet prior to the occurrence of a catastrophic structural failure. The continued airworthiness of airplanes can normally be maintained by proper inspection, maintenance, and when necessary, by parts replacement. On airplanes being operated beyond their expected design life, the FAA has determined that long term continued operational safety will be better assured by design changes to remove the source of the problem rather than by repetitive inspections or special operating procedures. Long term special operating procedures may not provide the degree of safety assurance necessary. This coupled with a better understanding of the human factor associated with numerous continual special procedures, has led the FAA to consider placing less emphasis on special procedures and more emphasis on design improvements. At an April, 1989 public conference, the General Aviation Manufacturers Association (GAMA) and the Regional Airline Association (RAA) recommended twenty-three (23) separate industry and government actions intended to resolve the aging commuter airplane issue. Recommendation No. 3 stated: "The FAA should take the lead, working closely with industry, to review existing ADs on all airplanes used in regional air carrier service to determine if repetitive inspections need to be replaced by terminating actions."

In December 1989, the FAA conducted a review of the existing ADs applicable to the Beech 99 Series airplanes, and identified AD 73-03-04 [which requires repetitive inspections] as one that could be terminated by the installation of an improved part. AD 73-03-04 required periodic inspection of the vertical fin for cracking unless the fin had been replaced by a fin of improved design, or unless the fin main spar had been reinforced. The FAA finds that the

superseding action, as proposed by the notice, meets the intent of GAMA/RAA Recommendation No. 3 and is consistent with current FAA policy. Since the condition described is likely to exist or develop in other Beech 99 Series airplanes of the same design, the new AD will supersede AD 73-03-04 and require replacement of each existing vertical fin of original design, which has accumulated 20,000 or more hours TIS with one of the improved fin designs, unless it has the reinforcing plate doubler installed per Beech Service Instructions No. 0530-134, Rev. 1 dated June 1975.

Interested persons have been afforded an opportunity to comment on the proposal. No comments or objections were received on the proposal or the FAA determination of the related costs to the public. Accordingly, the proposal is adopted without change. The FAA has determined that there are approximately 150 airplanes affected by the proposed AD. The cost of modifying these airplanes as required by the proposed AD is estimated to be \$14,000 per airplane. The total cost is estimated to be \$2.1 million. The total cost of complying with the proposed AD is less than \$100 million, the threshold for a significant rule. This cost per airplane is less than the threshold significant cost amount for those small entities operating one airplane and the FAA has determined, on the basis of the aircraft registration records, that less than 34% of the owners of the affected airplanes own more than one of the affected airplanes so as to incur a cost greater than the significant amount threshold. The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location

provided under the caption "ADDRESSES".

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by superseding AD 73-03-04, Amendment 39-3695, with the following new AD:

Beech: Applies to Models 99, 99A, and A99A (Serial Numbers (S/N) U-1 through U-147, except U-146); and B99 (S/N U-148 through U-151, except U-147) airplanes certified in any category. Compliance: Required as indicated after the effective date of this AD, unless already accomplished.

To prevent loss of structural integrity in the vertical stabilizer (fin) main spar, accomplish the following:

(a) For airplanes that have accumulated 2,000 or more hours TIS on the effective date of this AD, within the next 50 hours TIS, unless already accomplished within the last 450 hours TIS per AD 73-03-04, and thereafter at intervals not to exceed 500 hours TIS, visually inspect utilizing a three to five power magnifying glass the vertical fin main spar at each side of the bend location for cracks or nicks as shown in Figure 3 of Beechcraft Service Instructions No. 0530-134, Revision 1, dated June 1975.

(b) If, during any inspection required herein, a crack that does not exceed 0.25 inches in length is found in either a spar flange or in an angle doubler, and no such cracks are found in both members on the same side, prior to further flight either:

(1) Repair the spar by installing a plate doubler in accordance with Beechcraft Service Instructions No. 0530-134, Revision 1, dated June 1975, and reinspect at 500 hour intervals thereafter per Paragraph (a) of this AD; or

(2) Replace the spar with an equivalent airworthy part and reinspect per the requirements of this AD.

(c) If, during any inspection required herein, a crack is found in both the spar flange and angle doubler flange on the same side, or if a crack exceeds 0.25 inch in length, prior to further flight replace the vertical fin assembly with a Part Number (P/N) 115-640000-605 or -607 or -651 vertical fin.

(d) Within the next 500 hours TIS after the effective date of this AD, or upon the

accumulation of 20,000 hours TIS on the original vertical stabilizer, whichever occurs later, either:

(1) Replace the vertical fin with a serviceable P/N 115-640000-605 or -607 or -651 vertical fin; or

(2) Verify that no cracks have ever been detected in the affected structure and install a plate doubler per Beechcraft Service Instructions No. 0530-134, Rev. 1, dated June 1975.

(e) The inspections specified in paragraph (a) of this AD are no longer required in a P/N 115-640000-605 or -607 or -651 vertical fin or a plate doubler per Paragraph (d)(2) of this AD has been installed. A doubler installed over previously cracked structure does not comply with this paragraph.

(f) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD can be accomplished.

(g) An alternate method of compliance or adjustment of the initial or repetitive compliance times which provides an equivalent level of safety, may be approved by the Manager, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209.

Note: The request should be forwarded through an FAA Maintenance Inspector, who may add comments and send it to the Manager, Wichita Aircraft Certification Office. All persons affected by this directive may obtain copies of the document referred to herein upon request to the Beech Aircraft Corporation, Commercial Service, Department 52, P.O. Box 85, Wichita, Kansas 67201-0085; or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment supersedes AD 73-03-04, Amendment 39-3695.

This amendment becomes effective on September 11, 1990.

Issued in Kansas City, Missouri, on July 9, 1990.

Don C. Jacobsen,

Acting Manager, Small Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. 90-16873 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 89-CE-29-AD; Amdt. 39-6670]

**Airworthiness Directives; Boeing of Canada Ltd., deHavilland Models DHC-6-1, DHC-6-100, DHC-6-200, and DHC-6-300 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment revises an existing Airworthiness Directive (AD), applicable to deHavilland Model DHC-6-1, DHC-6-100, DHC-6-200, and DHC-6-300 airplanes, which currently requires visual inspections of the

elevator quadrant for distortion and the quadrant mounting support brackets for cracks. This revision, prompted by comments received from the manufacturer and a U.S. operator, modifies the inspection requirements of the AD. The actions specified in this revised AD will preclude loss of elevator control and subsequent loss of the airplane.

**DATES:** Effective Date: September 13, 1990.

**Compliance:** As prescribed in the body of this AD.

**ADDRESSES:** Information on Boeing of Canada Ltd., deHavilland Model DHC-6 airplanes is available from the manufacturer, Boeing of Canada, Ltd., deHavilland Division, Garratt Boulevard, Downsview Ontario, Canada M3K 1Y5. Information pertaining to the issuance of this AD may be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Anthony Socias, Airframe Branch, Aerospace Engineer, FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York 11581; Telephone (516) 791-6220; Facsimile (516) 791-9024.

**SUPPLEMENTARY INFORMATION:** This amendment revises AD 89-24-06, Amendment 39-6387, applicable to deHavilland Models DHC-6-1, DHC-6-100, DHC-6-200, and DHC-6-300 series airplane which requires visual inspections of the elevator quadrant for distortion and of the quadrant mounting support bracket for cracks. Amendment 39-6387 was published in the Federal Register on November 15, 1989 (54 FR 47511). Shortly thereafter, the FAA received comments from the manufacturer and an airline operator regarding the part numbers referenced in the AD as well as the required inspection requirements.

As a result of these comments, the FAA requested the assistance of Transport Canada, who has the responsibility and authority to maintain the continuing airworthiness of these airplanes in Canada. After an investigation, Transport Canada advised the FAA that it was necessary to include additional part numbers in the U.S. AD since there had been various modifications installed on these airplanes. Transport Canada also provided additional information regarding the inspections currently specified in the AD.

After careful review of the available data, including all of the comments

noted above and the information provided by Transport Canada, the FAA has determined that it is necessary to revise AD 89-24-06. As currently written, this AD does not correctly reference all of the applicable elevator quadrant and quadrant mounting support bracket part numbers. The FAA has also determined that the inspection requirements regarding the quadrant mounting support bracket need to be clarified so that the bracket is inspected for cracks only if the elevator quadrant is found to be distorted.

Since the FAA has determined that the unsafe condition described herein is likely to exist or develop in other airplanes of the same type design, an amendment to AD 89-24-06 is being issued, applicable to deHavilland Models DHC-6-1, DHC-6-100, DHC-6-200, and DHC-6-300 airplanes, that will correctly identify the applicable part numbered components that are to be inspected, and specify the correct inspection criteria for the elevator quadrant support bracket. Because an emergency condition exists that requires the immediate adoption of this regulation, it is found that notice and public procedure hereon are impractical and contrary to the public interest, and good cause exists for making this amendment effective in less than 30 days.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Therefore, in accordance with Executive Order 12812, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and that it is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket (otherwise, an evaluation is not

required). A copy of it, if filed, may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by revising AD 89-24-06, Amendment 39-6387, to read as follows:

**Boeing of Canada, Ltd., DeHavilland:** Applies to Models DHC-8-1, DHC-8-100, DHC-8-200, and DHC-8-300, (all serial numbers) airplanes, certificated in any category.

Compliance: Required as indicated in the body of the AD, unless already accomplished per AD 89-24-06.

To prevent loss of elevator control, accomplish the following:

(a) Within the next 25 hours time-in-service (TIS) after the effective date of this AD, and thereafter at intervals not to exceed 200 hours TIS, accomplish the following:

**Note 1:** When a parked Model DHC-8 airplane has been subjected to wind gusts of 35 mph or greater (including helicopter or jet blasts), new damage may occur to the elevator control system.

(1) Visually inspect the elevator quadrant, Part Number (P/N) C6CFM 1138-27 (Pre Mod 6/1394), or P/N C6CFM 1450-27 (Post Mod 6/1394 PCI S/N 331, Pre Mod 6/1678), or P/N C6CFM 1450-29 (Post Mod 6/1678, PCI S/N 602), for distortion by viewing the quadrant from the forward or aft direction to detect warping or buckling, and by looking for score marks on the quadrant topside face due to constant rubbing against the side of the cable guard.

(2) If the elevator quadrant is found distorted, prior to further flight replace it with a serviceable part and reinspect the quadrant at 200 hours TIS intervals thereafter.

(3) If the elevator quadrant is found distorted, prior to further flight visually inspect the elevator quadrant mounting support bracket P/N C6CFM 1142-1 for cracks using a strong light and minimum four power magnifying glass.

**Note 2:** Pay particular attention to the outer and inner surfaces of two lugs of the bracket.

(4) If the elevator quadrant support bracket is found cracked, prior to further flight replace it with a serviceable part.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An alternate means of compliance or adjustment of the initial or repetitive compliance times which provides an equivalent level of safety may be approved by the Manager, New York Aircraft Certification Office, FAA, New England Region, Valley Stream, New York 11581.

**Note 3:** The request should be forwarded through an FAA Maintenance Inspector who may add comments and then send it to the Manager, New York Aircraft Certification Office.

All persons affected by this directive may examine the information pertaining to the issuance of this AD at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment revises AD 89-24-06, Amendment 39-6387.

This amendment becomes effective September 13, 1990.

Issued in Kansas City, Missouri, on July 11, 1990.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-16892 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 90-CE-07-AD; Amdt. 39-6666]

#### Airworthiness Directives; British Aerospace (BAe) PLC Models Jetstream 3101 and 3201 Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new Airworthiness Directive (AD), applicable to certain British Aerospace (BAe) PLC Jetstream Models 3101 and 3201 airplanes, which requires modification of the main cabin door attachment hardware. Two incidents have been reported where the shouldered bolt at the main door restraint cable upper attachment became loose, and in one case jammed the main door closed preventing it from being used for egress. This modification will allow continued use of this emergency exit and assure safe occupant egress.

**DATES:** Effective Date: September 11, 1990. Compliance: Required within the next 500 hours time-in-service after the effective date of this AD, unless already accomplished.

**ADDRESSES:** BAe Alert Service Bulletin (ASB) 52-A-JM7704, dated November 17, 1989, applicable to this AD, may be obtained from British Aerospace PLC, Manager, Product Support, Commercial Aircraft Airlines Division, Prestwick

Airport, Ayrshire, KA9 2RW, Scotland; Telephone (44-292) 79888; Facsimile (44-292) 79703; or British Aerospace, Inc. Librarian, Box 17414, Dulles International Airport, Washington, DC 20041; Telephone (703) 435-9100; Facsimile (703) 435-2628. This information may also be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Wayne E. Gaulzetti, Aircraft Certification Staff, Europe, Africa, and Middle East Office, FAA c/o American Embassy, B-1000 Brussels, Belgium; Telephone (322) 513.38.30 ext. 2710; Facsimile (322) 230.05.34; or Mr. John P. Dow, Sr., Small Airplane Directorate, Airplane Certification Service, FAA, 601 East 12th Street, Kansas City, Missouri 64106; Telephone (816) 426-6932; Facsimile (816) 426-2169.

#### SUPPLEMENTARY INFORMATION:

A proposal to amend part 39 of the Federal Aviation Regulations to include an AD requiring modification of the cabin door attachment hardware on certain BAe PLC Jetstream Models 3101 and 3201 airplanes was published in the Federal Register on March 19, 1990 (55 FR 10073). The FAA has received two reports of the main cabin door restraint cable bolt coming loose in flight on BAe Jetstream Models 3101 and 3201 airplanes. In one case, the door could not be opened on the ground without maintenance action. This door is used for passenger egress during emergency conditions as well as normal operation. Consequently, BAe issued Jetstream ASB 52-A-JM 7704, dated November 17, 1989, which describes a modification to the main cabin door attachment hardware.

The Civil Aviation Authority (CAA), which has responsibility and authority to maintain the continuing airworthiness of these airplanes in the United Kingdom (UK), classified this ASB and the actions recommended therein by the manufacturer as mandatory to assure the continued airworthiness of the affected airplanes. On airplanes operated under UK registration, this action has the same effect as an AD on airplanes certified for operation in the United States. The FAA relies upon the certification of the CAA-UK combined with FAA review of pertinent documentation in finding compliance of the design of these airplanes with the applicable United States airworthiness requirements and the airworthiness and conformity of products of this design.

certificated for operation in the United States.

The FAA examined the available information related to the issuance of BAe Jetstream ASB 52-A-JM 7704, dated November 17, 1989, and the mandatory classification of this ASB by the CAA-UK, and concluded that the condition addressed by BAe Alert Service Bulletin (ASB) Jetstream 52-A-JM 7704, dated November 17, 1989, was an unsafe condition that may exist on other airplanes of this type certificated for operation in the United States. Accordingly, the FAA proposed an amendment to part 39 of the Federal Aviation Regulations to include an AD on this subject. Interested persons have been afforded an opportunity to comment on the proposal. The Airline Pilots Association (ALPA), the only commenter, supported issuance of this AD and made no recommendations to alter the proposed action. Accordingly the proposal is adopted without change.

The FAA has determined that this regulation involves approximately 80 airplanes at an estimated one-time cost of \$40 for each airplane, or a total one time fleet cost of \$3,200. The cost of compliance with the AD is so small that the expense of compliance will not be a significant financial impact on any small entities operating these airplanes.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES".

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

**British Aerospace (BAe) PLC:** Applies to Models Jetstream 3101, and 3201 (Serial Numbers 757, 770 through 840, 842 through 847, 849, and 850) airplanes certificated in any category. Compliance: Required within the next 500 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent jamming of the cabin door in an emergency, accomplish the following:

(a) Modify the cabin door structure as described in BAe Jetstream Alert Service Bulletin (ASB) 52-A-JM 7704 dated November 17, 1989.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An alternate method of compliance or adjustment of the compliance time which provides an equivalent level of safety may be approved by the Manager, Brussels Aircraft Certification Staff, FAA, Europe, Africa, and Middle East Office, c/o American Embassy, B-1000 Brussels, Belgium.

**NOTE:** The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the Manager, Brussels Aircraft Certification Staff.

All persons affected by this directive may obtain copies of the document referred to herein upon request to British Aerospace PLC, Manager, Product Support, Commercial Aircraft Airlines Division, Prestwick Airport, Ayrshire, KA9 2RW, Scotland; Telephone (44-292) 79888; Facsimile (44-292) 79703; or British Aerospace, Inc., Librarian, Box 17414, Dulles International Airport, Washington, DC 20041; Telephone (703) 435-8100; Facsimile (703) 435-2628; or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 East 12th Street, Kansas City, Missouri 64108.

This amendment becomes effective on September 11, 1990.

Issued in Kansas City, Missouri, on July 9, 1990.

Don C. Jacobsen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-18875 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 89-CE-32-AD; Amdt. 39-5666]

**Airworthiness Directives; Fairchild (Swearingen) Models SA226-T, SA226-T(B), SA226-AT, SA226-TC, SA227-TT, SA227-AT, and SA227-AC Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Airworthiness Directive (AD) 90-05-06, applicable to certain Fairchild SA226 and SA227 series airplanes, which requires inspection and rework as necessary of the main landing gear door to nacelle skin gap to assure proper clearance. An error concerning the proper clearance dimensions was made in this AD during publication. This action will correct this error by providing the correct clearance dimensions.

**DATES:** Effective Date: August 13, 1990.

**Compliance:** Required within the next 250 hours' time-in-service after the effective date of this AD, unless already accomplished.

**ADDRESSES:** Fairchild Service Bulletins SA226-32-055 and SA227-32-027, both dated December 8, 1988, may be obtained from the Fairchild Aircraft Corporation, P.O. Box 790490, San Antonio, Texas 78279-0490, or may be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 East 12th Street, Kansas City, Missouri 64108.

**FOR FURTHER INFORMATION CONTACT:** Sam Lovell, Airplane Certification Office, FAA, Fort Worth, Texas 76193-0150; Telephone (817) 624-5159.

**SUPPLEMENTARY INFORMATION:** AD 90-05-06, Amendment 39-6519, applicable to certain Fairchild Aircraft Corporation Models SA226-T, SA226-T(B), SA226-AT, SA226-TC, SA227-TT, SA227-AT, and SA227-AC airplanes, requiring inspection and rework as necessary of the main landing gear door to nacelle skin gap to assure proper clearance was issued on February 14, 1990 [55 FR 6977, February 28, 1990].

Subsequently, the FAA has determined that an error was made in the AD clearance dimension specifications and that the AD should be corrected.

Since this amendment provides a clarification only, and imposes no additional burden on any person, notice and public procedure hereon are unnecessary, and the amendment may be made effective in less than 30 days.

The FAA has determined there are approximately 656 airplanes affected by this AD. The cost of the inspections and adjustments specified in the original AD is unchanged and is estimated to be \$300 per airplane. The total cost is estimated to be \$196,800. The cost of compliance with the AD is so small that the expense of compliance will not have significant financial impact on any small entities operating these airplanes.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Therefore, I certify that this action (1) is not a "major rule" under the provisions of Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES".

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by revising AD 90-05-06, Amendment 39-6519, to read as follows:

**Fairchild (Swearingen):** Applies to Models SA226-T (Serial Numbers (S/N) T201 through T275, and T277 through T291), SA226-T(B) (S/N T(B)276 and T(B)292 through T(B)417), SA226-AT (S/N AT001 through AT074), SA226-TC (S/N TC201 through TC419), SA227-TT (S/N TT421 through TT541), SA227-AT (S/N AT423 through and AT695), SA227-AC (S/N AC406, AC415, AC416, and AC420 through AC729) airplanes certificated in any category. Compliance: Required within the next 250 hours time-in-service after the effective date of this AD, unless already accomplished per AD 90-05-06.

To prevent the main landing gear doors from jamming against the nacelle skin and preventing the extension of the landing gear, accomplish the following:

(a) Visually inspect the gap between the main landing gear doors and the adjacent nacelle skins to insure a clearance of  $0.38 \pm .03$  inches in accordance with the instructions specified in Fairchild Service Bulletin (S/B) SA226-32-055 and (S/B) SA227-32-027, both dated December 8, 1988, as applicable. If rework of the door(s) is required to obtain the specified clearance, prior to further flight, accomplish the task in accordance with the instructions in the above applicable S/B.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An alternate method of compliance or adjustment of the compliance time which provides an equivalent level of safety may be approved by the Manager, Airplane Certification Office, Federal Aviation Administration, Department of Transportation, Fort Worth, Texas 76193-0150.

**Note:** The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the Manager, Fort Worth Airplane Certification Office.

All persons affected by this directive may obtain copies of the documents referred to herein upon request to the Fairchild Aircraft Corporation, P.O. Box 790490, San Antonio, Texas 78279-0490, or may examine these documents at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 East 12th St., Kansas City, Missouri 64106.

This Amendment revises AD 90-05-06, Amendment 39-6519.

This Amendment becomes effective on August 13, 1990.

Issued in Kansas City, Missouri, on July 9, 1990.

Don C. Jacobsen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-16874 Filed 7-18-90; 8:45 am]

BILLING CODE 4810-13-M

#### 14 CFR Part 39

[Docket No. 89-CE-24-AD; Amdt. 39-6672]

**Airworthiness Directives; Fairchild Models SA226-T, SA226-T(B), SA226-AT, SA226-TC, SA227-TT, SA227-AT, and SA227-AC Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Airworthiness Directive (AD) 90-03-19, which presently requires the removal of the Battery Bus Relay Diode on certain Fairchild Models SA226-T, SA226-T(B), SA226-AT, SA226-TC, SA227-TT, SA227-AT, and SA227-AC airplanes. The FAA has determined that an error was made in the serial number applicability in the AD. This amendment will insure that the AD will be applicable to all affected airplanes.

**DATES:** August 15, 1990.

**Compliance:** Required within the next 100 hours time-in-service after the effective date of this AD unless already accomplished.

**ADDRESSES:** Fairchild Service Bulletins SA226-24-032 and SA227-24-013, both dated August 7, 1989, may be obtained from the Fairchild Aircraft Corporation, P.O. Box 790490, San Antonio, Texas, 78279-0490, or may be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

**FOR FURTHER INFORMATION CONTACT:** Sam Lovell, Airplane Certification Office, FAA, Fort Worth, Texas, 76193-0150; Telephone (817) 624-5159.

**SUPPLEMENTARY INFORMATION:** AD 90-03-19, Amendment 39-6499 (55 FR 3046) currently requires the removal of the battery bus relay diode on certain Fairchild Models SA226-T, SA226-T(B), SA226-AT, SA226-TC, SA227-TT, SA227-AT, and SA227-AC airplanes. Subsequent to the issuance of this AD, the FAA determined that an error had been made in the affected serial number listing for Model SA226-T airplanes in the applicability statement of the AD. This amendment corrects the error and will eliminate any confusion regarding the correct applicability for this AD.

Therefore, the FAA is amending AD 90-03-19 by changing the affected serial number listing for Model SA226-T airplanes. In addition, minor changes have been made to the wording of paragraph (a) in the AD to provide a more complete compliance statement.

Since the FAA has determined that the unsafe condition described in the original issuance of AD 90-03-19 is still likely to exist or develop in other airplanes of the same type design, AD 90-03-19 is being amended. It requires removal of the battery bus relay diode on certain Fairchild Models SA226-T, SA226-T(B), SA226-AT, SA226-TC, SA227-TT, SA227-AT, and SA227A airplanes. Because an emergency condition still exists that requires the immediate adoption of this regulation, and because confusion may exist regarding the correct applicability of the AD, it is found that notice and public procedure hereon are impractical and contrary to the public interest, and good cause exists for making this amendment to AD 90-03-19 effective in less than 30 days.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this amended regulation is still an emergency regulation and that it is still not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this amended rule since the amendment must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action continues to involve an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by revising AD 90-03-19, amendment 39-6499, to read as follows:

**Fairchild Aircraft Corporation (formerly Swearingen Aviation Corporation):** Applies to Models SA226-T (Serial Numbers [S/N] T201 through T275, and T277 through T291), SA226-T(B), [S/N] T(B)279 and T(B)292 through T(B)417), SA226-AT (S/N AT001 through AT074), SA226-TC (S/N TC201 through TC419), SA227-TT (S/N TT421 through TT541), SA227-AT (S/N AT423 through AT695), SA227-AC (S/N AC408, AC415, AC418, AC420 through AC705, and AC707 through AC733) airplanes certificated in any category. Compliance: Required within the next 100 hours time-in-service after the effective date of this AD, unless already accomplished per AD 90-03-19.

To prevent an inadvertent deenergized battery bus relay, which could result in unrecoverable loss of the airplane's electrical power, accomplish the following:

(a) Modify the electrical system using the following procedures, or the procedures contained in Fairchild Service Bulletins SA226-24-032 and SA227-24-013, both dated August 7, 1989, as applicable:

(1) Remove the access cover of the "J-Box", EP11.

(2) Locate Battery Bus Relay K40 and remove diode from across X1 and X2 terminals.

(3) Reinstall access cover.

(4) Using the Battery Switches, verify that battery voltage is present on the LH Essential, RH Essential, and Nonessential buses.

**Note 1:** Fairchild Service Bulletins SA226-24-032 and SA227-24-013 both dated August 7, 1989, pertain to the subject of this AD.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An alternate method or adjustment of the compliance time, which provides an equivalent level of safety, may be approved by the Manager, Airplane Certification Office, Federal Aviation Administration, Fort Worth, Texas 76193-0150.

**Note 2:** The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the Manager, Airplane Certification Office, Fort Worth, Texas.

All persons affected by this directive may obtain copies of the documents referred to herein upon request to the Fairchild Aircraft Corporation, P.O. Box 790490, San Antonio, Texas 78279-0490, or may examine these documents at the FAA, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

This amendment revises AD 90-03-19, Amendment 39-6499.

This amendment becomes effective on August 15, 1990.

Issued in Kansas City, Missouri, on July 11, 1990.

Barry D. Clements,

Manager, Small Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. 90-16877 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 88-ASW-43; Amdt. 39-6341]

**Airworthiness Directives; McDonnell Douglas Helicopter Co. (MDHC) Model 369 D, E, F, and FF Helicopters**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Correction to final rule.

**SUMMARY:** This amendment corrects an editorial error in an Airworthiness directive (AD) which required repetitive inspections of main rotor blade retention strap (strap packs) laminates for cracks and failures. The correction specifies the proper part number for the strap pack in paragraph (d) of the previously issued AD.

**EFFECTIVE DATE:** July 19, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Sol Davis, Aerospace Engineer, Airframe Branch, ANM-123L, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425, telephone (213) 988-5233.

**SUPPLEMENTARY INFORMATION:** On October 11, 1988, the FAA issued AD 89-02-01, Amendment 39-6051 (54 FR 105, January 4, 1989) applicable to MDHC Model 369 D, E, F, and FF helicopters, which required repetitive inspections of main rotor retention strap (strap pack) laminates for cracks and failures. On September 19, 1989, the FAA issued AD 89-02-01R1, Amendment 39-6341 (54 FR 40382; October 2, 1989) applicable to the same MDHC model helicopters, which clarified the strap pack rejection criteria and simplified the recording requirements.

Paragraph (d) of the original AD which was not changed by AD revision (R1) incorrectly specified the strap pack part number as 369D21200. The correct part number is 369D21210. Action is taken to correct the final rule accordingly.

Since this action only corrects an editorial error in a final rule, it has no adverse economic impact and imposes

no additional economic burden on any person. Therefore, notice and public procedures hereon are unnecessary and the amendment may be made effective in less than 30 days.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[CORRECTED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Corrected]

2. Section 39.13 is amended by correcting paragraph (d) of Amendment 39-6051 (54 FR 105, January 4, 1989), AD 89-02-01 as follows:

(d) For Model 369D hub assemblies (P/N 369D21200) which were subject to inspections under AD 77-19-04 (retention straps with P/N 369D21210-BSC) at intervals of 25 hours, conduct the inspections required by this AD within 25 hours' time in service from the last inspection made in accordance with AD 77-19-04, and thereafter at intervals not to exceed 25 hours' time in service.

This amendment becomes effective July 19, 1990.

Issued in Fort Worth, Texas, on July 6, 1990.

James D. Erickson,  
Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 90-16876 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 135

#### Public Address and Crewmember Intercom Systems

#### CFR Correction

In title 14 of the Code of Federal Regulations, parts 60 through 139, revised as of January 1, 1990, on page 660, in § 135.150(a)(7), "[insert a date one year after the effective date of this amendment]" should read "November 27, 1990".

BILLING CODE 1505-01-D

#### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

#### 18 CFR Part 37

[Docket No. RM89-15-000]

#### Generic Determination of Rate of Return on Common Equity for Public Utilities

July 13, 1990.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of benchmark rate of return on common equity for public utilities.

SUMMARY: In accordance with § 37.5 of its regulations, the Federal Energy Regulatory Commission, by its designee, the Director of the Office of Economic Policy, issues the update to the benchmark rate of return on common equity applicable to rate filings made during the period August 1, 1990 through October 31, 1990. This benchmark rate is set at 12.06 percent.

EFFECTIVE DATE: August 1, 1990.

FOR FURTHER INFORMATION CONTACT: Marvin Rosenberg, Office of Economic Policy, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 (202) 208-1283.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3308 at the Commission's Headquarters, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Insurance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to use 300, 1200, or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this notice will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

#### Benchmark Rate of Return on Common Equity for Public Utilities

On December 26, 1989, the Federal Energy Regulatory Commission (Commission) issued a final rule (Order No. 517) concerning the generic determination of the rate of return on common equity for public utilities.<sup>1</sup> In several earlier rulemaking proceedings, the Commission established a discounted cash flow (DCF) formula to determine the average cost of common equity and a quarterly indexing procedure to calculate benchmark rates of return on common equity for public utilities and codified the formula and procedure at § 37.9 of its regulations.<sup>2</sup> In Order No. 517, the Commission determined that 4.3 percent is an appropriate expected annual dividend growth rate for use in the quarterly indexing procedure during the 12 months beginning February 1, 1990 and that 0.02 percent is an appropriate flotation cost adjustment factor for that period.

The Commission, by its designee, the Director of the Office of Economic Policy, uses the quarterly indexing procedure to determine that the benchmark rate of return on common equity applicable to rate filings made during the period August 1, 1990 through October 31, 1990 is 12.06 percent.

Section 37.9 of the Commission's regulations requires that the quarterly benchmark rate of return be set equal to the average cost of common equity for the jurisdictional operations of public utilities. This average cost is based on the average of the median dividend yields for the two most recent calendar quarters for a sample of 98 utilities. The average yield is used in the following formula with fixed adjustment factors (determined in the most recent annual proceeding) to determine the cost rate:

$$k_t = 1.02 Y_t + 4.32$$

where  $k_t$  is the average cost of common equity and  $Y_t$  is the average dividend yield.

The attached appendix provides the supporting data for this update. The median dividend yields for the sample of utilities for the first and second quarters of 1990 are 7.48 percent and 7.69, respectively. The average yield for those two quarters is 7.59 percent. Use of the average dividend yield in the above formula produces an average cost of common equity of 12.06 percent.

<sup>1</sup> Generic Determination of Rate of Return on Common Equity for Public Utilities, Order No. 517, 55 FR 148 (Jan. 3, 1990), FERC Stats. and Regs. § 30,871 (Dec. 26, 1989).

<sup>2</sup> 18 CFR 37.9 (1989). The most recent adoption of the DCF formula and quarterly indexing procedure came in Order No. 489, 53 FR 3342 (Feb. 5, 1988).

This notice supplements the generic rate of return rule announced in Order No. 517, issued December 26, 1989 and effective on February 1, 1990.

#### List of Subjects in 18 CFR Part 37

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends part 37, chapter I,

title 18 of the Code of Federal Regulations, as set forth below, effective August 1, 1990.

Richard P. O'Neill,  
Director, Office of Economic Policy.

#### PART 37—GENERIC DETERMINATION OF RATE OF RETURN ON COMMON EQUITY FOR PUBLIC UTILITIES

1. The authority citation for part 37 is revised to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a-825r (1988); Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1988).

2. In § 37.9, paragraph (d) is revised to read as follows:

#### § 37.9 Quarterly indexing procedure.

(d) *Table of Quarterly Benchmark Rates of Return.* The following table presents the quarterly benchmark rates of return on common equity:

Benchmark applicability period	Dividend increase adjustment factor	Expected growth adjustment factor	Current dividend yield	Cost of common equity	Benchmark rate of return
(t)	(a)	(b)	(Y <sub>t</sub> )	(K <sub>t</sub> )	
2/1/86-4/30/86	1.02	4.54	9.03	13.75	13.75
5/1/86-7/31/86	1.02	4.54	8.37	13.08	13.25
8/1/86-10/31/86	1.02	4.54	7.49	12.18	12.75
11/1/86-1/31/87	1.02	4.54	6.75	11.43	12.25
2/1/87-4/30/87	1.02	4.63	6.44	11.20	11.20
5/1/87-7/31/87	1.02	4.63	6.54	11.30	11.30
8/1/87-10/31/87	1.02	4.63	6.97	11.74	11.74
11/1/87-1/31/88	1.02	4.63	7.49	12.27	12.27
2/1/88-4/30/88	1.02	4.36	7.90	12.42	12.42
5/1/88-7/31/88	1.02	4.36	7.99	12.51	12.51
8/1/88-10/31/88	1.02	4.36	7.84	12.36	12.36
11/1/88-1/31/89	1.02	4.36	7.92	12.44	12.44
2/1/89-4/30/89	1.02	4.33	7.89	12.38	12.38
5/1/89-7/31/89	1.02	4.33	7.95	12.44	12.44
8/1/89-10/31/89	1.02	4.33	7.94	12.43	12.43
11/1/89-1/31/90	1.02	4.33	7.56	12.04	12.04
2/1/90-4/30/90	1.02	4.32	7.28	11.75	11.75
5/1/90-7/31/90	1.02	4.32	7.38	11.85	11.85
8/1/90-10/31/90	1.02	4.32	7.59	12.06	12.06

Note: The appendix will not be published in Code of Federal Regulations

#### Appendix

Exhibit No.	Title
1.....	Initial sample of utilities
2.....	Utilities excluded from the sample for the indicated quarter due to either zero dividends or a reduction in dividends for this quarter or the prior three quarters
3.....	Annualized dividend yields for the indicated quarter for utilities retained in the sample

Source of Data Standard and Poor's Compustat Services, Inc., Utility COMPSTAT II Quarterly Data Base.

#### EXHIBIT 1—SAMPLE OF UTILITIES

Utility	Ticker Symbol	Industry Code
Allegheny Power System.....	AYP	4911
American Electric Power.....	AEP	4911

#### EXHIBIT 1—SAMPLE OF UTILITIES—Continued

Utility	Ticker Symbol	Industry Code
Atlantic Energy Inc.....	ATE	4911

#### EXHIBIT 1—SAMPLE OF UTILITIES—Continued

Utility	Ticker Symbol	Industry Code
Baltimore Gas & Electric.....	BGE	4931

EXHIBIT 1—SAMPLE OF UTILITIES—  
Continued

Utility	Ticker Symbol	Industry Code
Black Hills Corp.....	BKH	4911
Boston Edison Co.....	BSE	4911
Carolina Power & Light.....	CPL	4911
Centerior Energy Corp.....	CX	4911
Central & South West Corp.....	CSR	4911
Central Hudson Gas & Elec.....	CNH	4931
Central Ill Public Service.....	CIP	4931
Central Louisiana Electri.....	CNL	4911
Central Maine Power Co.....	CTP	4911
Central Vermont Pub Serv.....	CV	4911
Cicorp Inc.....	CER	4931
Cincinnati Gas & Electric.....	CIN	4931
CMS Energy Corp.....	CMS	4931
Commonwealth Edison.....	CWE	4911
Commonwealth Energy Syste.....	CES	4931
Consolidated Edison of NY.....	ED	4931
Delmarva Power & Light.....	DEW	4931
Detroit Edison Co.....	DTE	4911
Dominion Resources Inc.....	D	4931
DPL Inc.....	DPL	4931
DQE Inc.....	DQE	4911
Duke Power Co.....	DUK	4911
Eastern Utilities Assoc.....	EUA	4911
Empire District Electric.....	EDE	4911
Entergy Corp.....	ETR	4911
Fitchburg Gas & Elec Ligh.....	FGE	4931
Florida Progress Corp.....	FPC	4911
FPL Group Inc.....	FPL	4911
General Public Utilities.....	GPU	4911
Green Mountain Power Corp.....	GMP	4911
Gulf States Utilities Co.....	GSU	4911
Hawaiian Electric Inds.....	HE	4911

EXHIBIT 1—SAMPLE OF UTILITIES—  
Continued

Utility	Ticker Symbol	Industry Code
Houston Industries Inc.....	HOU	4911
I E Industries Inc.....	IEL	4931
Idaho Power Co.....	IDA	4911
Illinois Power Co.....	IPC	4931
Interstate Power Co.....	IPW	4931
Iowa Resources Inc.....	IOR	4911
Iowa-Illinois Gas & Elec.....	IWG	4931
Ipalco Enterprises Inc.....	IPL	4911
Kansas City Power & Light.....	KLT	4911
Kansas Gas & Electric.....	KGE	4911
Kansas Power & Light.....	KAN	4931
Kentucky Utilities Co.....	KU	4911
Long Island Lighting.....	LIL	4931
Louisville Gas & Electric.....	LOU	4931
Maine Public Service.....	MAP	4911
Midwest Energy Co.....	MWE	4931
Minnesota Power & Light.....	MPL	4911
Montana Power Co.....	MTP	4931
Neco Enterprises Inc.....	NPT	4911
Nevada Power Co.....	NVP	4911
New England Electric Syst.....	NES	4911
New York State Elec & Gas.....	NGE	4931
Niagara Mohawk Power.....	NMK	4931
Nipco Industries Inc.....	NI	4931
Northeast Utilities.....	NU	4911
Northern States Power-MN.....	NSP	4931
Ohio Edison Co.....	OEC	4911
Oklahoma Gas & Electric.....	OGE	4911
Orange & Rockland Utiliti.....	ORU	4931
Pacific Gas & Electric.....	PCG	4931
Pacificorp.....	PPW	4931
Pennsylvania Power & Ligh.....	PPL	4911

EXHIBIT 1—SAMPLE OF UTILITIES—  
Continued

Utility	Ticker Symbol	Industry Code
Philadelphia Electric Co.....	PE	4931
Pinnacle West Capital.....	PNW	4911
Portland General Corp.....	PGN	4911
Potomac Electric Power.....	POM	4911
PSI Resources Inc.....	PIN	4911
Public Service Co of Colo.....	PSR	4931
Public Service Co of N H.....	PNH	4911
Public Service Co of N ME.....	PNM	4931
Public Service Entrp.....	PEG	4931
Puget Sound Power & Light.....	PSD	4911
Rochester Gas & Electric.....	RGS	4931
San Diego Gas & Electric.....	SDO	4931
Scana Corp.....	SCG	4931
Scecorp.....	SCE	4911
Sierra Pacific Res.....	SRP	4931
Southern Co.....	SO	4911
Southern Indiana Gas & EL.....	SIG	4931
St Joseph Light & Power.....	SAJ	4931
Teco Energy Inc.....	TE	4911
Texas Utilities Co.....	TXU	4911
TNP Enterprises Inc.....	TNP	4911
Tucson Electric Power Co.....	TEP	4911
Union Electric Co.....	UEP	4911
United Illuminating Co.....	UIL	4911
Unitil Corp.....	UTL	4911
Utilicorp United Inc.....	UCU	4931
Washington Water Power.....	WWP	4931
Wisconsin Energy Corp.....	WEC	4931
Wisconsin Public Service.....	WPS	4931
WPL Holdings Inc.....	WPH	4931

N=98.

EXHIBIT 2—UTILITIES EXCLUDED FROM THE SAMPLE FOR THE INDICATED QUARTER DUE TO EITHER ZERO DIVIDENDS OR A CUT IN THE  
DIVIDENDS FOR THIS QUARTER OR THE PRIOR THREE QUARTERS

[Year=90 Quarter=2]

Ticker symbol	Utility	Reason for exclusion
BSE.....	Boston Edison Co.....	Dividend rate was reduced for the quarter CALENDAR 90Q1.
CMS.....	CHS Energy Corp.....	Dividend rate was zero for quarter CALENDAR 89Q3.
GSU.....	Gulf States Utilities Co.....	Dividend rate was zero for quarter CALENDAR 90Q2.
IPC.....	Illinois Power Co.....	Dividend rate was zero for quarter CALENDAR 90Q2.
NMK.....	Niagara Mohawk Power.....	Dividend rate was zero for quarter CALENDAR 90Q2.
PE.....	Philadelphia Electric Co.....	Dividend rate was reduced for the quarter CALENDAR 90Q2.
PNW.....	Pinnacle West Capital.....	Dividend rate was zero for quarter CALENDAR 90Q2.
PGN.....	Portland General Corp.....	Dividend rate was reduced for the quarter CALENDAR 90Q1.
PNH.....	Public Service Co of M N.....	Dividend rate was zero for quarter CALENDAR 90Q2.
PNM.....	Public Service Co of N ME.....	Dividend rate was zero for quarter CALENDAR 90Q2.
TEP.....	Tucson Electric Power Co.....	Dividend rate was zero for quarter CALENDAR 90Q2.

N=11.

## EXHIBIT 3—ANNUALIZED DIVIDEND YIELDS FOR THE INDICATED QUARTER FOR UTILITIES RETAINED IN THE SAMPLE

[Year = 90 Quarter = 2]

Ticker Symbol	Price, 1st month of qtr-high	Price, 1st month of qtr-low	Price, 2nd month of qtr-high	Price, 2nd month of qtr-low	Price, 3rd month of qtr-high	Price 3rd month of qtr-low	Average price	Dividends annual rate	Annualized dividend yield
AEP.....	30.500	29.125	30.250	28.500	30.375	28.750	29.583	2.400	8.113
ATE.....	37.000	35.250	37.750	35.125	37.875	34.875	36.312	2.960	8.151
AYP.....	39.250	36.750	39.750	37.125	40.125	37.625	38.437	3.160	8.221
BGE.....	30.375	28.375	30.875	27.875	29.750	28.125	29.229	2.100	7.185
BKH.....	28.500	27.250	28.000	27.000	29.375	27.625	27.958	1.640	5.868
CER.....	35.750	31.750	34.625	31.750	34.500	32.750	33.521	2.460	7.339
CES.....	37.375	33.500	35.000	33.500	34.875	34.250	34.750	2.920	8.403
CIN.....	30.500	28.250	30.625	28.375	30.625	29.750	29.688	2.400	8.084
CIP.....	22.125	20.375	22.125	20.625	22.125	21.000	21.396	1.840	8.600
CNH.....	22.500	21.000	22.500	20.625	22.875	22.125	21.937	1.760	8.023
CNL.....	34.250	32.250	33.625	32.000	34.250	33.500	33.312	2.560	7.685
CPL.....	44.375	42.750	46.000	43.250	46.000	43.500	44.312	2.920	6.590
CSR.....	39.750	38.125	40.750	38.250	40.750	38.000	39.271	2.760	7.028
CTP.....	19.500	17.875	19.125	17.875	19.125	18.625	18.687	1.560	8.348

## EXHIBIT 3—ANNUALIZED DIVIDEND YIELDS FOR THE INDICATED QUARTER FOR UTILITIES RETAINED IN THE SAMPLE—Continued

[Year = 90 Quarter = 2]

Ticker Symbol	Price, 1st month of qtr-high	Price, 1st month of qtr-low	Price, 2nd month of qtr-high	Price, 2nd month of qtr-low	Price, 3rd month of qtr-high	Price, 3rd month of qtr-low	Average price	Dividends annual rate	Annualized dividend yield
CV	29.250	25.750	28.000	26.000	28.750	27.375	27.521	2.040	7.413
CWE	35.000	30.375	33.875	31.000	33.875	31.750	32.646	3.000	9.190
CX	19.250	17.375	19.500	17.875	19.000	18.250	18.542	1.600	8.629
D	45.000	41.375	46.250	41.750	45.125	43.625	43.854	3.320	7.571
DEW	20.000	18.125	19.500	18.125	19.500	18.750	19.000	1.540	8.105
DPL	19.417	17.917	19.500	18.000	19.250	18.250	18.722	1.560	8.332
DQE	21.875	20.875	22.625	21.375	23.000	21.625	21.896	1.360	6.211
DTE	25.500	24.625	27.375	24.500	27.625	25.625	25.875	1.780	8.879
DUK	55.375	52.375	56.375	52.375	56.500	55.000	54.867	3.120	5.707
ED	26.500	23.625	25.875	23.250	24.625	23.250	24.521	1.820	7.422
EDE	31.000	30.500	31.250	30.000	30.250	28.875	30.312	2.320	7.654
ETR	21.125	18.750	20.625	18.750	20.875	18.875	19.833	1.000	5.042
EUA	35.125	33.250	34.000	31.500	34.125	32.375	33.398	2.600	7.785
FGE	31.125	30.250	30.500	29.125	31.000	29.375	30.229	2.120	7.013
FPC	38.125	35.375	38.500	35.750	37.875	36.125	36.958	2.640	7.143
FPL	32.625	29.500	32.500	29.750	32.375	30.125	31.146	2.360	7.577
GMP	25.500	24.625	24.875	24.000	24.625	23.375	24.500	1.980	8.082
GPU	46.000	41.625	45.000	42.125	44.750	43.375	43.812	2.600	5.934
HE	36.875	33.000	34.625	32.000	34.250	32.375	33.854	2.160	6.380
HOU	33.375	31.250	34.250	31.750	33.625	31.875	32.687	2.960	9.055
IDA	27.125	23.625	26.375	23.375	25.875	24.000	25.062	1.860	7.421
IEL	28.125	25.625	27.750	26.250	27.000	24.500	26.542	2.060	7.761
IOR	21.875	20.000	22.000	20.625	22.625	21.875	21.500	1.700	7.907
IPL	25.250	23.375	25.750	23.375	25.875	24.125	24.625	1.800	7.310
IPW	25.750	22.875	24.375	23.000	25.500	24.000	24.250	2.000	8.247
IWG	22.000	21.187	21.687	20.625	21.875	20.750	21.354	1.670	7.821
KAN	23.250	21.250	23.250	21.375	23.125	21.750	22.333	1.800	8.060
KGE	21.125	20.125	21.500	20.125	21.250	20.125	20.708	1.720	8.306
KLT	33.250	30.375	33.875	30.375	33.500	32.000	32.229	2.580	7.943
KU	20.500	18.750	20.750	18.750	20.000	19.125	19.646	1.460	7.432
LIL	19.375	17.750	19.375	18.125	19.235	18.750	18.792	1.000	5.322
LOU	38.500	36.625	39.000	36.500	39.750	37.500	37.979	2.780	7.320
MAP	22.000	20.250	21.000	19.375	22.500	21.000	21.021	1.680	7.992
MPL	25.625	24.250	25.875	24.375	25.875	24.625	25.104	1.860	7.409
MTP	20.875	18.875	20.500	18.375	20.500	19.000	19.687	1.420	7.213
MWE	21.000	18.750	20.375	18.875	21.250	19.750	20.000	1.640	8.200
NES	27.375	24.750	27.000	24.875	27.250	26.000	26.208	2.040	7.784
NGE	25.375	22.500	25.000	22.625	25.000	23.500	24.000	2.040	8.500
NI	18.125	16.625	17.875	16.625	18.125	16.750	17.354	1.040	5.993
NPT	7.200	6.900	6.800	6.200	6.800	6.500	6.575	0.640	9.734
NSP	36.250	33.000	36.750	33.500	37.250	35.000	35.292	2.220	6.290
NU	21.250	19.375	20.750	19.250	20.375	19.000	20.000	1.760	8.800
NVP	22.500	20.750	22.750	20.875	22.750	22.000	21.937	1.560	7.111
OEC	19.625	18.125	20.750	18.250	20.750	19.625	19.521	1.960	10.041
OGE	36.250	33.000	35.750	33.125	35.875	34.375	34.729	2.480	7.141
ORU	31.250	28.750	30.375	28.625	30.625	29.500	29.854	2.300	7.704
PCG	22.250	21.125	23.125	21.250	23.500	22.375	22.271	1.520	6.825
PEG	26.750	24.375	27.250	24.500	26.750	25.000	25.771	2.080	8.071
PIN	17.625	15.625	17.500	15.625	17.625	16.875	16.812	0.800	4.758
POM	21.750	19.750	22.000	20.125	22.000	20.750	21.062	1.520	7.217
PPL	42.125	39.125	43.125	39.625	43.000	41.625	41.437	2.980	7.192
PPW	22.500	19.625	23.500	20.250	22.625	20.375	21.479	1.380	6.425
PSD	20.625	18.625	20.875	19.000	20.875	19.875	19.979	1.760	8.809
PSR	23.250	20.625	22.000	20.625	22.000	20.750	21.542	2.000	9.284
RGS	19.875	17.500	19.375	17.750	19.500	18.875	18.812	1.560	8.292
SAJ	26.250	24.750	26.750	25.250	27.875	26.750	26.271	1.600	6.090
SCE	37.875	35.625	40.000	35.875	39.750	37.250	37.729	2.640	6.997
SCG	33.000	31.250	33.750	31.250	33.750	32.375	32.562	2.520	7.739
SDO	42.875	39.500	43.625	40.000	43.750	42.250	42.000	2.700	6.429
SIG	30.000	28.750	30.000	28.625	30.625	29.125	29.521	1.900	6.436
SO	26.250	24.125	25.750	23.625	25.625	24.500	24.979	2.140	8.567
SRP	23.875	21.750	22.750	21.750	22.750	21.625	22.417	1.840	8.208
TE	29.250	27.250	29.500	27.000	29.625	28.625	28.542	1.620	5.676
TNP	19.125	18.250	18.500	14.500	18.125	15.500	17.000	1.630	8.588
TXU	35.375	32.000	37.250	34.750	37.875	34.750	35.333	2.960	8.377
UCU	21.000	19.875	21.000	19.875	20.500	19.750	20.333	1.440	7.082
UEP	27.375	24.875	27.000	25.125	26.750	25.750	26.146	2.080	7.955
UIL	30.250	28.500	29.125	27.375	29.750	27.750	28.792	2.320	8.058
UTL	35.000	33.375	33.375	31.875	33.125	31.875	33.104	2.200	6.646
WEC	28.875	26.750	29.375	26.750	29.500	28.250	28.250	1.760	6.230
WPN	23.000	21.625	23.875	22.125	23.250	21.750	22.604	1.740	7.698
WPS	21.625	20.625	22.625	20.625	21.875	20.750	21.354	1.620	7.586
WWP	28.875	28.000	29.875	28.000	30.000	28.250	28.833	2.480	8.601

N=87.

[FR Doc. 90-16815 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF LABOR

Employment and Training  
Administration

## 20 CFR Part 655

RIN 1205-AA83

Labor Certification Process for the  
Temporary Employment of Aliens in  
Agriculture in the United States; "Fifty-  
Percent Rule"AGENCY: Employment and Training  
Administration, Labor.ACTION: Continuation of interim final  
rule; request for comments.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (DOL) is publishing an interim final rule to continue the requirement in the regulations for the temporary alien agricultural labor certification (H-2A) program that requires employers of nonimmigrant (H-2A) workers to employ any qualified United States (U.S.) worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is on the job was hired, has elapsed ("fifty-percent rule"). The fifty-percent rule is a statutory requirement which DOL has included in the regulations for the H-2A program. The statute requires DOL to study various aspects of the fifty-percent rule and to address in rulemaking the advisability of continuing the rule.

DATES: Effective date: June 1, 1990.

**Comments:** Written comments on the interim final rule are invited from interested parties. Comments must be received on or before December 31, 1990.

**Contractor's report:** Copies of the contractor's report on the fifty-percent rule are expected to be available on or after October 1, 1990, and should be requested no earlier than that date.

## ADDRESSES:

**Comments:** Send written comments on the interim final rule to the Assistant Secretary of Labor, Employment and Training Administration, United States Department of Labor, Room N-4456, 200 Constitution Avenue NW., Washington, DC 20210; Attention: Director, United States Employment Service.

**Contractor's report:** Requests for copies of the contractor's final report shall be sent to the Assistant Secretary of Labor, Employment and Training

Administration, United States Department of Labor, room N-4456, 200 Constitution Avenue NW., Washington, DC 20210; Attention: Director, United States Employment Service; on or after October 1, 1990.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas M. Bruening, Chief, Division of Foreign Labor Certifications, United States Employment Service, Employment and Training Administration, United States Department of Labor. Telephone: 202-535-0163 (this is not a toll-free number).

## SUPPLEMENTARY INFORMATION:

## I. The H-2A Program

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*) provides that the Attorney General may not approve such a petition from an employer for employment of nonimmigrant alien workers (H-2A visa holders) for temporary or seasonal services or labor in agriculture in the United States unless the petitioner has applied to the Secretary of Labor (Secretary) for a temporary alien agricultural labor certification, showing that:

(A) There are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.<sup>1</sup>

In 1986, amendments to the INA made by the Immigration Reform and Control Act of 1986, Public Law 99-603 (IRCA) put into statute the Department of Labor's (DOL's or Department's) role in the temporary alien agricultural labor certification (H-2A) process. Prior to June 1, 1987, many of DOL's responsibilities now specified in the INA were carried out under the requirement in the INA (8 U.S.C. 1184(c)) that the

Attorney General consult with appropriate agencies of the Government concerning the importation of nonimmigrant workers, and under INS regulations governing the reliance placed by INS on the advice of DOL relative to U.S. worker availability and adverse effect. See 8 CFR 214.2(h)(3)(i) (1986); 20 CFR part 655, subpart C (1986). It was under this requirement that DOL administered the H-2 program, predecessor to the H-2A program.

On June 1, 1987, DOL published an interim final rule in the Federal Register, effective on that date, governing the H-2A labor certification process. 20 CFR part 655, subpart B; 52 FR 20496 (June 1, 1987); see also 52 FR 20524 (June 1, 1987); and 54 FR 28037 (July 5, 1989). The June 1, 1987, regulations contained changes to the labor certification process as mandated by IRCA and revised procedures as deemed necessary by DOL to carry out its statutory responsibilities.

## II. The Fifty-Percent Rule Requirement

One of the specific components of the H-2A process mandated by IRCA is a requirement that employers who are granted temporary alien agricultural labor certification hire qualified U.S. workers who apply to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed (the fifty-percent rule).

On this point, the statute states, in pertinent part:

(B)(i) For a period of 3 years subsequent to the effective date of this section, labor certifications shall remain effective only if, from the time the foreign worker departs for the employer's place of employment, the employer will provide employment to any qualified United States worker who applies to the employer until 50 percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide benefits, wages and working conditions required pursuant to this section and regulations.

(ii) The requirement of clause (i) shall not apply to any employer who—

(I) did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)),

(II) is not a member of an association which has petitioned for certification under this section for its members, and

(III) has not otherwise associated with other employers who are petitioning for temporary foreign workers under this section. (8 U.S.C. 1188(c)(3)(B) (i) and (ii).)

The statute further specifies that:

<sup>1</sup> Section 218 of the Immigration and Nationality Act (Act), 8 U.S.C. 1188, was formerly section 216 of the Act (and classified to 8 U.S.C. 1186), as added to the Act by section 301(c) of Pub. L. 99-603, 100 Stat. 3411 (November 6, 1986). It was renumbered from section 216 to section 218 of the Act by section 2(1) (2) and (3) of Pub. L. 100-525, 102 Stat. 2612 (October 24, 1988).

(iv) In complying with clause (i) of this subparagraph, an association shall be allowed to refer or transfer workers among its members: Provided, That for purposes of this section an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(v) United States workers referred or transferred pursuant to clause (iv) of this subparagraph shall not be treated disparately.

(vi) An employer shall not be liable for payments under section 655.202(b)(6) of title 20, Code of Federal Regulations (or any successor regulation) with respect to an H-2A worker who is displaced due to compliance with the requirement of this subparagraph, if the Secretary of Labor certifies that the H-2A worker was displaced because of the employer's compliance with clause (i) of this subparagraph.

(vii)(I) No person or entity shall willfully and knowingly withhold domestic workers prior to the arrival of H-2A workers in order to force the hiring of domestic workers under clause (i).

(II) Upon receipt of a complaint by an employer that violation of subclause (I) has occurred the Secretary shall immediately investigate. He shall within 36 hours of the receipt of the complaint issue findings concerning the alleged violation. Where the Secretary finds that a violation has occurred, he shall immediately suspend the application of clause (i) of this subparagraph with respect to that certification for that date of need.

(8 U.S.C. 1188(c)(3)(B) (iv), (v), (vi) and (vii).)

DOL has incorporated these statutory requirements into the implementing interim final H-2A program regulations of June 1, 1987 at 20 CFR 655.103(e) and 655.106 (e), (f), and (g). (52 FR 20516 and 20520, June 1, 1987.) These regulations are operative for an indefinite period of time, i.e., they have no expiration date.

The core of this component, requiring that employers hire qualified U.S. workers through fifty percent of the contract period (the fifty-percent rule), codifies a provision of the predecessor H-2 program regulations of DOL. See 20 CFR 655.203(e), 43 FR 10318, March 10, 1978. The fifty-percent rule under the former H-2 program was the subject of a lawsuit filed against DOL in 1983. The court ruled that the promulgation of the regulation was a lawful exercise of DOL's authority, and that the regulation was valid. *Virginia Agricultural Growers' Association, Inc. v. Department of Labor*, 756 F.2d 1025 (1985).

IRCA also stipulates that DOL take certain actions to examine the effectiveness of the fifty-percent rule, and to promulgate regulations to be effective no later than June 1, 1990, which address the continuation of the policy underlying the rule.

(iii) Six months before the end of the 3-year period described in clause (i), the Secretary

of Labor shall consider the findings of the report mandated by section 403(a)(4)(D) of the Immigration Reform and Control Act of 1986 as well as other relevant materials, including evidence of benefits to United States workers and costs to employers, addressing the advisability of continuing a policy which requires an employer, as a condition for certification under this section, to continue to accept qualified, eligible United States workers for employment after the date the H-2A workers depart for work with the employer. The Secretary's review of such findings and materials shall lead to the issuance of findings in furtherance of the Congressional policy that aliens not be admitted under this section unless there are not sufficient workers in the United States who are able, willing and qualified to perform the labor or service needed and that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. In the absence of the enactment of Federal legislation prior to three months before the end of the 3-year period described in clause (i) which addresses the subject matter of this subparagraph, the Secretary shall immediately publish the findings required by this clause, and shall promulgate, on an interim or final basis, regulations based on his findings which shall be effective no later than three years from the effective date of this section.

(8 U.S.C. 1188(c)(3)(B)(iii).)

### III. DOL Actions

#### A. Data Collection

Soon after the H-2A program became operational on June 1, 1987, ETA instituted a special reporting system which involves the ten ETA Regional Offices reporting monthly on H-2A activity in the ETA Regions. These reports include information on U.S. workers referred to H-2A employers by the State Employment Security Agencies (SESAs) under the fifty-percent rule and U.S. workers hired as the result of such SESA referrals.

Data provided by the Regional Offices for the 18-month reporting period January 1, 1988, through June 30, 1989, reveal the following pertinent facts:

(1) Nine hundred seventy-three (973) workers were referred to H-2A employers under the fifty-percent rule and 831 of these workers were hired. Workers hired represent 85% of the total referred.

(2) Fifteen hundred sixty-seven (1,567) workers were referred to H-2A employers (by SESAs) prior to the departure of alien workers for certified job opportunities (non-fifty-percent rule referrals), and 927 of these workers (59%) were hired.

(3) Of the total 2,540 U.S. workers referred (prior to and during the "fifty-percent period"), 38% were referred under the fifty-percent rule.

(4) Over the course of the 18-month period, 31,250 H-2A employer job opportunities were certified. The number of U.S. workers referred by SESAs to job opportunities certified for H-2A employers constitutes 3.11% of the total number of jobs certified.

#### B. Consideration of IRCA-Mandated Report

As required by section 218(c)(3)(B)(iii) of the INA (8 U.S.C. 1188(c)(3)(B)(iii)), DOL has considered the findings of the report mandated by section 403(a)(4)(D) of IRCA, 8 U.S.C. 1188 note. That report, from the President to Congress on the implementation of the H-2A program, was submitted to Congress in November 1988. The section of the report which is pertinent to this endeavor is section #4, "Recommendations for modifications to the program", subsection (d).

The relative benefits to domestic workers and burdens upon employers of a policy which requires employers, as a condition for certification under the program, to continue to accept qualified United States workers for employment after the date H-2A workers depart for work with the employer.

There are no findings conclusions or recommendations offered relative to the fifty-percent rule in this section of the report, and there is no other information in the report which has bearing on DOL's consideration of the rule.

#### C. Research Project

DOL has contracted with a private organization for the conduct of a research project designed to gather information and assist in the Department's effort to analyze relative benefits to U.S. workers and costs to employers of the fifty-percent rule. The contractor's work includes extensive field interviews with workers and employers as well as SESA and Regional Office ETA staff. The study is expected to be completed later in 1990.

The contractor's final report will be made available to the public after it is delivered to the Department. Interested parties may request copies by writing to the address listed in the ADDRESSES section above after October 1, 1990.

#### IV. Conclusions

Absent any other relevant materials, DOL's conclusion on the advisability of continuing the fifty-percent rule stems from its analyses of the program data on SESA referrals and hires of U.S. workers described in III, A, above.

It is apparent from the data that U.S. workers referred to H-2A employers by SESAs under the rule constitute a significant percentage of the total number of workers referred, although

less than a majority. This suggests to DOL that, in some instances at least, the requirement in the statute that certification determinations be made twenty days before an employer's date of need might tend to foreclose legitimate employment opportunities for some U.S. workers who would otherwise be eligible for them absent a fifty-percent rule provision.

At the same time, the fact that the number of U.S. workers referred under the rule constitutes a very small percentage of the total number of jobs certified (and theoretically filled by alien H-2A visaholders) suggests that the implementation of the rule does not affect a significant number of employers who utilize the program. DOL also is not aware of any circumstances wherein application of the rule has resulted in any significant burden, financial or otherwise, being placed on employers or workers.

For these reasons, and because the rule has been a provision of the temporary alien agricultural labor certification program for years prior to IRCA, with no significant problems associated with its implementation, DOL has concluded that there are no reasons to undertake rulemaking efforts to alter the continuation of the present rule or otherwise amend it.

This, however, does not foreclose the possibility that DOL might, at a later date, choose to undertake rulemaking related to the discontinuation or amending of the rule. Such action would depend upon the final report of the results of the research project, program data supplied by the Regional Offices and other information which might be presented to DOL. In this vein, DOL is requesting public comments on the fifty-percent rule, particularly descriptions of experience with its implementation.

#### Regulatory Findings

##### Regulatory Impact

This document affects only those employers using nonimmigrant alien workers (H-2A visaholders) in temporary agricultural jobs in the United States. It does not have the financial or other impact to make it a major rule and, therefore, the preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 3 CFR 1981 Comp., p. 127, 5 U.S.C. 601 note.

##### Regulatory Flexibility

Since this is an interim final rule, it is not a regulation requiring notification to the Chief Counsel for Advocacy, Small Business Administration, under the Regulatory Flexibility Act, 5 U.S.C.

601(2). Nevertheless, the Department of Labor certifies herein that the interim final rule does not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

##### Publication as Interim Final Rule With Request for Comments

This document republishes an existing rule, with no change. As contemplated by the legislation (8 U.S.C. 1188(c)(3)(B)(iii)), it is being published on an interim final basis. Further, DOL has determined that:

- (1) To avoid any disruption of sectors of the agricultural labor market;
- (2) To afford the public a sufficient period to consider this document and the past-October 1, 1990, research project contractor's final report, described above; and
- (3) For the reasons set forth in the "Conclusions", above;

continuation of the existing rule as an interim final rule with post-publication comment is appropriate. These reasons form sufficient good cause, if requisite, to find that to do otherwise would be impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(B).

##### Paperwork Reduction Act

This document contains no paperwork requirements which mandate clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

##### Catalog of Federal Domestic Assistance Number

This program is listed in the "Catalog of Federal Domestic Assistance" as Number 17.202 "Certification of Foreign Workers for Agricultural and Logging Employment".

##### List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Guam, Labor, Migrant labor, Wages.

##### Interim Final Rule

Accordingly, part 655 of chapter V of title 20, Code of Federal Regulations, is amended as follows:

#### PART 655—LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. In 20 CFR part 655, the authority citation is revised to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H) and 1184(c), and 29 U.S.C. 49 *et seq.*; §§ 655.0, 655.00, and 655.000 also issued under 8 U.S.C. 1188 and 8 CFR 214.2(h)(4)(i); subpart A and subpart C also issued under 8 CFR

214.2(h)(4)(i); subpart B also issued under 8 U.S.C. 1188.

2. Section 655.103(e) is republished to read as follows:

##### § 655.103 Assurances.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H-2A workers any U.S. worker referred or transferred pursuant to this assurance.

3. Section 655.106 (f) and (g) is republished to read as follows:

##### § 655.106 Referral of U.S. workers; determinations based upon U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

(f) *Exceptions.* (1) "Fifty-percent rule" inapplicable to small employers. The assurance requirement at § 655.103(e) of this part does not apply to any employer who:

- (i) Did not, during any calendar quarter during the preceding calendar year, use more than 500 "man-days" of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the RA in the H-2A application; and
- (ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and
- (iii) Has not otherwise "associated" with other employers who are applying for H-2A workers under this subpart, and so certifies to the RA.

(2) *Displaced H-2A workers.* An employer shall not be liable for payment under § 655.102(b)(6) of this part with respect to an H-2A worker whom the RA certifies is displaced due to compliance with § 655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited.* (1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H-2A workers in order to force the hiring of

U.S. workers under § 655.103(e) of this part may submit a written complaint to the local office. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the local office.

(2) *Investigations.* The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (g) of this section has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the local office fails to conduct such interviews, the RA shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(4) *Written findings.* The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of § 655.103(e) of this part to the employer. Such suspension of § 655.103(e) of this part under these circumstances shall not take

place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The RA's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

Signed at Washington, DC, this 13th day of July, 1990.

Elizabeth Dole,

Secretary of Labor.

[FR Doc. 90-16926 Filed 7-18-90; 8:45 am]

BILLING CODE 4510-30-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 261

[SW-FRL-3809-9]

### Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Amendment

AGENCY: Environmental Protection Agency.

ACTION: Final rule; amendment.

SUMMARY: EPA is amending CFR 40, part 261, appendix IX to reflect changes in ownership and name for the Stauffer Chemical Company, Inc., St. Gabriel, Louisiana granted a conditional final exclusion on August 27, 1985 (50 FR 34690) and the Stauffer Chemical Company, Axis, Alabama granted a final exclusion on August 27, 1985 (50 FR 34690). Today's amendment notice documents these changes.

EFFECTIVE DATE: July 19, 1990.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free at (800) 424-9438 or at (202) 382-3000. For technical information, contact Mr. Chichang Chen, Office of Solid Waste (OS-343), Environmental Protection Agency, 401 M

Street SW., Washington, DC 20460, (202) 382-4782.

SUPPLEMENTARY INFORMATION: On November 17, 1989, the Agency was notified that the Stauffer Chemical Company (Stauffer), St. Gabriel, Louisiana, had been renamed Pioneer Chlor Alkali Company, Inc. (Pioneer). In this notification, Pioneer noted that no changes had been made in the management of K071 wastes previously excluded by the Agency (50 FR 34690, August 27, 1985) and that all conditions of the exclusion continue to be met. On February 5, 1990, the Agency was notified that the Stauffer Chemical Company (Stauffer), Axis, Alabama, had been renamed Akzo Chemicals Inc. (Akzo). In this notification, Akzo noted that no changes had been made in the management of K071 wastes previously excluded by the Agency (50 FR 34690, August 27, 1985) and that all conditions of the exclusion continue to be met. Today's notice documents these changes.

### List of Subjects in 40 CFR Part 261

Hazardous waste, Recycling, Reporting and recordkeeping requirements.

For reasons set out in the preamble, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

### PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

2. Part 261, appendix IX, Table 2, is amended by removing the two entries for "Stauffer Chemical Company" and by adding in alphabetical order the entries for "Pioneer Chlor Alkali Company, Inc." and "Akzo Chemicals Inc." to read as follows:

### Appendix IX—[Amended]

Table 2—Wastes Excluded From Specific Sources

Facility	Address	Waste Description
Akzo Chemicals Inc. (formerly Stauffer Chemical Company).	Axis, AL.....	Brine purification muds generated from their chlor-alkali manufacturing operations (EPA Hazardous Waste No. K071) and disposed of in brine mud pond HWTF: 5 EP-201.
Pioneer Chlor Alkali Company, Inc. (formerly Stauffer Chemical Company).	St. Gabriel, LA.....	Brine purification muds, which have been washed and vacuum filtered, generated after August 27, 1985 from their chlor-alkali manufacturing operations (EPA Hazardous Waste No. K071) that have been batch tested for mercury using the EP toxicity procedure and have been found to contain less than 0.05 ppm in mercury in the EP extract. Brine purification muds that exceed this level will be considered a hazardous waste.

Dated: July 2, 1990.

Jeffery D. Denit,

Deputy Director, Office of Solid Waste.

[FR Doc. 90-16405 Filed 7-18-90; 8:45 am]

BILLING CODE 6560-50-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[43 CFR Public Land Order 6787]

[AK-932-00-4214-10; AA-53140]

### Modification of Public Land Order No. 5180, as Amended, and Public Land Order No. 5184 for Classification and Opening of Lands; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

**SUMMARY:** This order modifies two public land orders insofar as they affect approximately 1,845,225 acres of public lands which are withdrawn and reserved for study to determine their proper classification. This order classifies the lands as suitable for and opens the lands to the Federal Land Policy and Management Act of 1976; location and entry under all mining laws; and, for approximately 1,636,628 acres of the total, to appropriation under the mineral leasing laws, if such lands are otherwise available.

**EFFECTIVE DATE:** July 19, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Sandra C. Thomas, BLM Alaska State Office, 222 W. 7th Avenue, No. 13, Anchorage, Alaska 99513-7599, 907-271-3342.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), and by section 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1616(d)(1) (1988), it is ordered as follows:

1. Public Land Order No. 5180, as amended by Public Land Order Nos. 5251, 5321, and 5418, and Public Land Order No. 5184 are hereby modified to allow for appropriation or disposal as stated in paragraphs 3, 4, and 5 of this order insofar as they affect the following described lands:

#### Seward Meridian (Unsurveyed)

(a) Iditarod/George Planning Block

T. 23 N., R. 39 W.,

Secs. 19, 20, 21, and secs. 28 to 33, inclusive.

T. 28 N., R. 39 W.,

Secs. 4 to 9, inclusive, secs. 16, 17, and 18.

T. 27 N., R. 39 W.,

T. 23 N., R. 40 W.,

Secs. 4 to 9, inclusive, and secs. 16 to 36, inclusive.

T. 24 N., R. 40 W.,

Secs. 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.

Tps. 25, 26, and 27 N., R. 40 W.

Tps. 23 to 27 N., R. 41 W.

T. 22 N., R. 42 W.,

Secs. 1 to 12, inclusive, secs. 15 to 22, inclusive, secs. 28 to 32, inclusive, secs. 35 and 36.

Tps. 23 to 27 N., R. 42 W.

Tps. 22, 23, and 24 N., R. 43 W.

T. 25 N., R. 43 W.,

Secs. 1 to 30, inclusive;

Sec. 31, NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ N $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , and S $\frac{1}{2}$ ;

Secs. 32 to 36, inclusive.

Tps. 26 and 27 N., R. 43 W.

T. 24 N., R. 44 W.,

Secs. 1 to 7, inclusive;

Sec. 8, NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ , W $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , and S $\frac{1}{2}$ ;

Secs. 9 to 36 inclusive.

Tps. 25, 26, and 27 N., R. 44 W.

Tps. 24 to 27 N., R. 45 W.

Tps. 24 and 25 N., rs. 46, 47, and 48 W.

T. 26 N., R. 48 W.,

Secs. 1 to 12, inclusive, secs. 14 to 23, inclusive, and secs. 25 to 36, inclusive.

T. 27 N., R. 48 W.

Tps. 24 to 27 N., Rs. 49 and 50 W.

T. 21 N., R. 51 W.,

Secs. 6, 7, 18, 19, 30, and 31.

Tps. 22 to 27 N., R. 51 W.

Tps. 21 to 26 N., R. 52 W.

T. 20 N., R. 53 W.,

Secs. 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.

Tps. 21 and 22 N., R. 53 W.

T. 23 N., R. 53 W.,

Sec. 1, 2, 3, secs. 10 to 15, inclusive, and secs. 19 to 36, inclusive.

T. 24 N., R. 53 W.,

Sec. 1, 2, 3, secs. 10 to 15, inclusive, secs. 22 to 27, inclusive, secs. 34, 35, and 36.

T. 18 N., R. 54 W.,

Secs. 2, 3, 11, 14, and 23.

Tps. 20, 21, and 22 N., R. 54 W.

T. 21 N., R. 55 W.

Tps. 20 and 21 N., R. 56 W.

T. 20 N., R. 57 W.

T. 21 N., R. 57 W.

Secs. 19 to 36, inclusive.

T. 20 N., R. 58 W.

T. 21 N., R. 58 W.,

Secs. 23 to 26, inclusive, secs. 35 and 36.

T. 20 N., R. 59 W.,

Secs. 23 to 26, inclusive, and secs. 31 to 36, inclusive.

The areas described aggregate

approximately 1,636,628 acres.

(b) Iditarod/George Planning Block

T. 20 N., R. 51 W.,

Secs. 6 to 36, inclusive.

T. 21 N., R. 51 W.,

Secs. 1 to 5, inclusive, secs. 8 to 17, inclusive, secs. 20 to 29, inclusive, and secs. 32 to 35, inclusive.

Tps. 20, 27, 29, and 30 N., R. 52 W.

T. 18 N., R. 53 W.,

Secs. 1, 2, secs. 11 to 14, inclusive, secs. 23 to 26, inclusive, secs. 34, 35, and 36.

T. 20 N., R. 53 W.,

Secs. 1, 2, 3, Secs. 10 to 15, inclusive, Secs. 22 to 27, inclusive, secs. 34, 35, and 36.

T. 23 N., R. 53 W.,

Secs. 4 to 9, inclusive, secs. 16, 17, and 18.

T. 24 N., R. 53 W.,

Secs. 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.

T. 28 N., R. 53 W.

T. 21 N., R. 57 W.,

Secs. 1 to 18, inclusive.

T. 21 N., R. 58 W.,

Secs. 1 to 4, inclusive, and secs. 9 to 16, inclusive.

The areas described aggregate approximately 208,597 acres.

The areas described aggregate a total of approximately 1,845,225 acres.

2. Subject to valid existing rights, the lands described above are hereby classified as suitable for appropriation as specified in paragraphs 3, 4, and 5, and opened to appropriation on the stated effective dates in this order.

3. At 10 a.m. on August 20, 1990, the lands described in paragraph 1(a) and (b) will be opened to the operation of Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 (1988), subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on August 20, 1990, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. At 10 a.m. on August 20, 1990, the lands described in paragraph 1(a) and (b) will be opened to location and entry under all the United States mining laws. Appropriation of any of the lands described in this order under the general mining laws, except locations for metalliferous minerals, prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with

Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

5. At 10 a.m. August 20, 1990, the lands described in paragraph 1(a) will be opened to the mineral leasing laws.

6. This order does not change any provisions or limitations of the Public Land Orders listed in paragraph 1, or any other withdrawals of record, except as expressly provided above.

Dated: July 6, 1990.

Dave O'Neal,

*Assistant Secretary of the Interior.*

[FR Doc. 90-16801 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-JA-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MM Docket No. 89-163; RM-6935]

#### Radio Broadcasting Services; Columbus, NE

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of Husker Broadcasting, Inc., substitutes Channel 228C1 for Channel 228A at Columbus, Nebraska, and modifies its license for Station KWMG to specify the higher powered channel. See 54 FR 26220, June 22, 1989. Channel 228C1 can be allotted to Columbus in compliance with the Commission's minimum distance separation requirements with a site restriction of 29.7 kilometers (18.5 miles) west to avoid a short-spacing to the construction permit for Station KRRK(FM), Channel 227A, Bennington, Nebraska. The coordinates for Channel 228C1 at Columbus, Nebraska, are North Latitude 41-32-28 and West Longitude 97-40-50. With this action, this proceeding is terminated.

**EFFECTIVE DATE:** August 30, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 89-163, adopted July 9, 1990, and released July 16, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may

also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., suite 140, Washington, DC 20037.

### List of Subjects in 47 CFR Part 73

Radio broadcasting.

## PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

### § 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments under Nebraska, is amended by removing Channel 228A and adding Channel 228C1 at Columbus.

Federal Communications Commission.

Kathleen B. Levitz,

*Deputy Chief, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 90-16846 Filed 7-18-90; 8:45 am]

BILLING CODE 6712-01-M

### 47 CFR Part 73

[MM Docket No. 89-386; RM-6880]

#### Radio Broadcasting Services; Orangeburg, SC

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of Wilkes-Posey Broadcasting, Inc., substitutes Channel 280C3 for Channel 280A at Orangeburg, South Carolina, and modifies its license for Station WKSO to specify the higher powered channel. See 54 FR 37702, September 12, 1989. Channel 280C3 can be allotted to Orangeburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.1 kilometers (6.3 miles) north to avoid a short-spacing to Station WGEC, Channel 280A, Springfield, Georgia, and to accommodate petitioner's desired transmitter site. The coordinates for this allotment are North Latitude 33-35-00 and West Longitude 80-50-00. With this action, this proceeding is terminated.

**EFFECTIVE DATE:** August 30, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 89-386, adopted July 5, 1990, and released July 16, 1990. The full text of this Commission decision is available for inspection and

copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., suite 140, Washington, DC 20037.

### List of Subjects in 47 CFR Part 73

Radio Broadcasting.

## PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

### § 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments under South Carolina, is amended by removing Channel 280A and adding Channel 280C3 at Orangeburg.

Federal Communications Commission.

Kathleen B. Levitz,

*Deputy Chief, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 90-16848 Filed 7-18-90; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

RIN 1018-AB31

#### Endangered and Threatened Wildlife and Plants; Determination of Endangered or Threatened Status for Five Plants from the Southern San Joaquin Valley

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) determines endangered status pursuant to the Endangered Species Act of 1973 (Act), as amended, for four plants: *Caulanthus californicus* (California jewelflower), *Eremalche kernensis* (Kern mallow), *Lembertia congdonii* (San Joaquin woolly-threads), and *Opuntia treleasei* (Bakersfield cactus). The Service also determines threatened status for one plant, *Eriastrum hooveri* (Hoover's woolly-star). These species are restricted to grassland and adjacent plant communities (valley sink scrub, valley saltbush scrub, and juniper woodland) in the southern San Joaquin Valley, California, and neighboring foothills and

valleys. The five plants have been variously affected and are threatened by one or more of the following: urbanization, conversion of native habitat for agriculture (ag-land conversion) and related water development, oil and gas development and exploration, livestock grazing, competition from alien plants, utilization of habitat for groundwater recharge basins or for disposal of agricultural effluent or runoff, flood control projects, off-road vehicle use, mining, telecommunication and electrical line construction, alteration of the natural fire regime, poor air quality, and stochastic extinction by virtue of the small isolated nature of the remaining populations. This rule implements the protection and recovery provisions afforded by the Act for these plants.

**EFFECTIVE DATE:** August 20, 1990.

**ADDRESSES:** The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Sacramento Field Office, 2800 Cottage Way, Room E-1823, Sacramento, California 95825.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jim A. Bartel, at the above address (916/978-4868 or FTS 460-4868).

**SUPPLEMENTARY INFORMATION:**

#### Background

*Caulanthus californicus*, *Eremalche kernensis*, *Eriastrum hooveri*, *Lembertia congdonii*, and *Opuntia treleasei* are endemic to grassland and adjacent plant communities (valley sink scrub, valley saltbush scrub, and juniper woodland (cf. Holland 1986)) of the southern San Joaquin Valley and neighboring foothills and valleys of California. This portion of the San Joaquin Valley, often referred to as the Tulare Lake Basin, contains roughly 2.5 million acres of nearly flat, valley floor. If the neighboring valleys (i.e., Carrizo Plain, Cuyama Valley) and foothills are included with the Tulare Lake Basin, prehistoric grassland and adjacent plant communities likely totalled over 6 million acres. However, 96 percent of the native habitats of the valley floor has been lost principally to urbanization and ag-land conversion (Richard Anderson, California Energy Commission, pers. comm. July 21, 1987). The remaining non-urbanized or non-converted lands have been subject to livestock grazing, water development, oil and gas development and exploration, off-road vehicle use, mining, and/or other anthropogenic actions.

The prehistoric composition of the native grasslands and adjoining plant communities likely will remain a

mystery (Brown 1982), although numerous authors have speculated as to the composition of the "pristine" flora of the Central Valley, inclusive of the San Joaquin Valley and Tulare Lake Basin (Clements 1934, Munz and Keck 1950, Biswell 1956, Twisselmann 1956, White 1967, McNaughton 1968, Bakker 1971, Ornduff 1974, Heady 1977, Bartolome and Gemmill 1981, and Wester 1981). Alien, annual grasses and forbs invaded the low-elevation, plant communities of California during the days of the Franciscan missionaries. Today, these grasses, which account for 50 to 90 percent of the vegetative cover (Heady 1956) and can stand up to a meter in height (Holland 1986), dominate most grasslands in California. Alien grasses have outcompeted the native flora throughout much of California because these exotics germinate in late fall prior to the germination of the native forbs, including the four herbaceous species listed herein (*Caulanthus californicus*, *Eremalche kernensis*, *Eriastrum hooveri*, and *Lembertia congdonii*). Consequently, these four herbs generally occupy sites with reduced grass cover. Although the stem succulent listed herein (*Opuntia treleasei*) persists in areas largely dominated by alien plants (mostly annual grasses), the cactus does not necessarily prefer such "grassy" sites. The invasion of grasses has been quite thorough throughout much of the lower elevation portions of California. These exotics likely compete for nutrients and water, and may further threaten *Opuntia treleasei* by providing abundant fine (slender) fuels, which probably increase the frequency and intensity of wildfires affecting the species' habitat.

The five plant taxa largely persist today in three native plant communities adjoining the non-native annual grasslands: valley sink scrub, valley saltbush scrub, or juniper woodland. However, these plant communities too have been affected somewhat by the presence of alien grasses. Valley sink scrub is an open to dense shrubland dominated by alkali-tolerant plants of the goosefoot family (Chenopodiaceae, so called "chenopods"), like iodinebush (*Allenrolfea occidentalis*) and sea-blight (*Suaeda* spp.). This plant community, which generally lacks or produces a sparse understory of herbs, occurs about the margins of playas and on the heavy clays of the valley floor. Valley sink scrub essentially has been lost due to ag-land conversion, flood control projects, and ground-water pumping (Holland 1986). Valley saltbush scrub, a scrubland of chenopods over a low understory of annual herbs, typically occurs on the gentle, rolling hills

surrounding the Tulare Lake Basin on sandy to loamy soils. Similar activities, including oil and gas exploration and development, have adversely affected and threaten this plant community (Holland 1986). Juniper woodland, a compact woodland of California juniper (*Juniperus californica*), often adjoins grassland sites immediately above the valley floor on gentle sloping terraces. Livestock grazing is the predominant activity influencing this community.

#### Discussion of the Five Species

*Caulanthus californicus* (California jewelflower) evidently was first collected by Mrs A.E. Bush near Tulare, although the date and repository of this specimen are unknown (Taylor and Davilla 1986). Serano Watson, citing the Bush collection as the type, described the plant as *Stanfordia californica* in 1880. Although E.L. Greene (1891) had placed most species of *Caulanthus* within the genus *Streptanthus*, Edwin Payson (1923) transferred the species to the former genus. Dean Taylor and William Davilla (1986) discussed in detail the appropriate generic assignment for the jewelflower and concurred with I.A. Al-Shehbaz (1973) that the monotypic genus *Stanfordia* should be submerged within *Caulanthus*. *C. californicus*, a rosette-forming annual herb of the mustard family (Brassicaceae), grows to about 1 foot in height and produces several flowering branches. The leaves of the species have dry, wavy margins and its non-rosette leaves clasp the stem. The flowers are translucent white with purple to green tips. Its sword-shaped siliques (narrow, many-seeded pods) attain a length of 1 inch and width of about 1/4 inch. The shape and size of siliques, together with an absence of hairs and an inflated stem, separate *C. californicus* from its closest relatives: *C. coulteri* var. *coulteri*, *C. coulteri* var. *lemmonii* and *C. inflatus*. *Caulanthus californicus* historically was distributed within the general area bounded by the present-day cities or communities of Coalinga and Fresno in Fresno County, New Cuyama in Santa Barbara County, and Bakersfield in Kern County (Taylor and Davilla 1986). Previously known from 47 sites, the plant now exists as one introduced population in Kern County, a natural population in Santa Barbara County, and eight populations in San Luis Obispo County. Taylor and Davilla (1986) reported in a status survey that intensive livestock grazing, ag-land conversion, and other anthropogenic activities likely extirpated *Caulanthus californicus* from Fresno, Kings, and Tulare Counties.

*Eremalche kernensis* (Kern mallow) was first collected by Carl Wolf in the Temblor Valley about 7 miles northwest of McKittrick along the Lost Hills Road in Kern County in 1937. Using his collection as the type, Wolf described *E. kernensis* in 1938. Although Phillip Munz (1959) at first placed all *Eremalche* in *Malvastrum* in his flora of California, he later concurred with the use of *Eremalche* in his supplement (Munz 1968). The species, a small annual herb of the mallow family (Malvaceae), typically develops an erect (rarely decumbent to prostrate) stem about 2 to 4 inches in height. The plant produces white to rose-pink or lavender, hollyhock-like flowers (Taylor and Davilla 1986). Although other characters (i.e., flower color, shape of the calyx lobes, flower size) have been employed in the past (Wiggins 1951, Munz 1959, Leonelli 1986), differences in leaf shape, pubescence (hair type and density), color-spotting on the petal, and number of carpels (seed-bearing organs) per flower separate *E. kernensis* from other members of the genus. Contrary to Thomas Kearney (1956) and Robert Hoover (1970), Taylor and Davilla (1986) concluded that the species was valid and that morphologically similar plants often confused with *E. kernensis* were actually male-sterile *E. parryi*. Restricted to the eastern base of the Temblor Range, the species ranges from the vicinity of McKittrick to near Buttonwillow within valley saltbush scrub in Kern County (Taylor and Davilla 1986). Oil and gas development likely extirpated the species at the type locality, and ag-land conversion probably eliminated one other population of *E. kernensis*. Because the remaining four populations exist near active oil and gas fields or in the vicinity of transmission corridors (Taylor and Davilla 1986), further oil and gas development in the area or transmission line maintenance or expansion likely would threaten these sites. The species, to a lesser degree, may be affected by ag-land conversion, livestock overgrazing, exotic plant competition, telecommunication and electrical line construction, and off-road vehicle use.

*Eriastrum hooveri* (Hoover's woolly-star) was evidently first collected in 1935 by Gregory Lyons near Little Panoche Creek in Fresno County. However, Willis Jepson (1943), in describing the plant as *Huegelia hooveri*, cited a 1937 collection by Robert Hoover (the namesake for the specific epithet) as the type. Later Herbert Mason (1945) transferred the species along with the rest of the woolly-stars to *Eriastrum*. *E. hooveri*, an annual

herb of the phlox family (Polemoniaceae), produces many wire-like branches and small (about 1/4 inch across), white flowers. Standing about 2-3 inches tall, the species has grayish, fuzzy stems and is often branched (Taylor and Davilla 1986). Primarily, flower size and the ratio of corolla tube to the length of petal lobes separate the species from other *Eriastrum*, although stamen characteristics play a secondary role (Taylor and Davilla 1986). *E. hooveri* was historically distributed in the Temblor Range (Kern and San Luis Obispo Counties), Cuyama Valley (San Luis Obispo and Santa Barbara Counties) and in a discontinuous fashion within valley saltbush scrub and valley sink scrub from Fresno County south in the San Joaquin Valley (Taylor and Davilla 1986). Reportedly the species never grew around the borders of the historic Tulare Lake (Kings County). Twelve of the historical and extant populations of the species, including the type locality (7 miles south of Shafter in Kern County), have been extirpated by various habitat modifications (Taylor and Davilla 1986). Ag-land conversion, urbanization, conversion of habitat "for ground-water recharge basins or disposal of nutrient-agricultural effluent," and oil and gas development threaten 92 percent of the remaining populations of the species.

*Lembertia congdonii* (San Joaquin woolly-threads) was first collected by J.W. Congdon near Deer Creek in Tulare County. Using the Deer Creek collection as the type, Asa Gray described the species in 1883. Greene placed the plant in his newly-created, monotypic genus *Lembertia* in 1897. Although subsequent floras (i.e., Munz 1959, Abrams and Ferris 1960) included this species in the genus *Eatonella*, Taylor (1987) maintained that the species is sufficiently different from *Eatonella* and other relatives to warrant placement within a monotypic genus. This annual herb, a member of the sunflower family (Asteraceae), produces several, frequently branching stems arising from the base. These white-wooly stems grow to about 10 inches in length and often trail on the ground. Aside from differences in growth habit, disk and ray flowers, and other minor characters, the presence of dimorphic achenes (one-seeded, indehiscent fruit) separate *L. congdonii* from its closest relative, *Eatonella nivea* from the Great Basin (Taylor 1987). Associated with valley saltbush scrub, only 12 populations of *L. congdonii* remain in the San Joaquin Valley and adjoining foothills from the vicinity of Panoche Pass (San Benito County) southeasterly to Caliente Creek,

east of Bakersfield (Kern County) (Taylor 1987). Another seven populations occur to the southwest in the Cuyama Valley (San Luis Obispo and Santa Barbara Counties) and Carrizo Plain (San Luis Obispo County). Primarily as a result of ag-land conversion, 33 populations or 63 percent of the 52 historical populations of the species have been lost (Taylor 1987). Ag-land conversion, urbanization, gravel and sand extraction, oil and gas development, continued overgrazing, and off-road vehicle use threaten the remaining stands of *L. congdonii*.

*Opuntia treleasei* (Bakersfield cactus) evidently was first collected east of the community of Caliente in Kern County by William Trelease in 1892. After cultivating this collection in the Missouri Botanical Garden, John Coulter (1896) described the species using this garden material as the type. James Tournay (1901) treated the species as a variety of the widespread *O. basilaris* in Bailey's *Cyclopedia of Horticulture*. David Griffiths and Raleigh Hare (1906) described the long-spiny form of the species from along the Kern River bluffs as *O. treleasei* var. *kernii*. Although Munz (1959) and Lyman Benson (1969 and 1982) continued to treat the Bakersfield cactus as *O. basilaris* var. *treleasei*, Charlotte Chamberlain (U.S. Corps of Engineers 1986) concluded that the *O. treleasei* is morphologically distinct from *O. basilaris*. *O. treleasei*, a low-growing cactus (Cactaceae) that typically spreads to form extensive thickets, generally develops beavertail-like pads (flattened stems) 3 to 4 inches wide by 5-7 inches long. The areoles (eye-spots) are never depressed but flush with the pad surface or somewhat raised. All areoles have spines, although they vary in number and length. Unlike *O. basilaris*, the surface of the pads, which are nearly cylindrical at the base, is not papillate (covered with numerous small protuberances). Although the large magenta flowers of *O. treleasei* appear identical to *O. basilaris*, the characters cited above clearly separate these two taxa as species. Found chiefly within annual grassland on sandy to sandy-loam soils, the species historically grew atop the low hills northeast of Oildale southeasterly along the valley floor to the low foothills of the Tehachapi Mountains southeast and south-southwest of Arvin in Kern County. Charles Preuss (1844), John C. Fremont's cartographer, wrote of this area, that "(t)he, hilly country is bleak, without any vegetation except a beautiful species of cactus whose magnificent red blossoms grace this sad, sandy desert in a strange manner." Ernest Twisselmann

(1969) claimed the species "once grew in dense almost impenetrable colonies on the mesas east of Bakersfield." A photograph in a book by Britton and Rose (1920) attests to the species' former abundance. As late as 1937, biologists noted that the species produced a "thick growth" along Caliente Creek (Piemeisel and Lawson 1937). However, ag-land conversion (primarily for the production of potatoes and cotton), oil development, sand mining, urbanization, and perhaps wildfire have reduced this formerly widespread species to numerous, small isolated colonies. These colonies can be divided into five general population areas: The oilfields northeast of Oildale, Kern River Bluffs northeast of Bakersfield, the bluffs and rolling hills west and north of Caliente Creek east of Bakersfield, Comanche Point on the Tejon Ranch southeast of Arvin, and northwest of the community of Wheeler Ridge. Off-road vehicle use, proposed flood control basins, telecommunication and electrical line construction, and the activities cited above continue to threaten the remaining sites.

Federal government actions on these five plants began as a result of section 12 of the Endangered Species Act of 1973, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975. In the report, *Opuntia basilaris* var. *treleasei* was listed as an endangered species. On July 1, 1975 (40 FR 27823), the Service published a notice in the Federal Register of its acceptance of the report as a petition within the context of section 4(c)(2), now section 4(b)(3) of the Act, and of the Service's intention thereby to review the status of the plant taxa named within. *Opuntia basilaris* var. *treleasei* was included in that notice. On June 16, 1976, the Service published a proposed rule in the Federal Register (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to section 4 of the Act. The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94-51 and the July 1, 1975, Federal Register publication. *Opuntia basilaris* var. *treleasei* was included in the proposed rule. General comments received in relation to the 1976 proposal were summarized in an April 26, 1978, Federal Register publication, which also determined 13 plant species to be endangered or threatened (43 FR 17909).

On December 10, 1979, the Service published a notice of withdrawal of that portion of the June 16, 1976, proposal that had expired due to a procedural requirement of the 1978 Amendments. On December 15, 1980, the Service published a revised notice of review of native plants in the Federal Register (45 FR 82480); *Opuntia basilaris* var. *treleasei* was included as a category 1 species (species for which data in the Service's possession indicate proposed listing is warranted). On November 28, 1983, the Service published in the Federal Register (48 FR 53640) a supplement to the 1980 notice of review. This supplement added *Caulanthus californicus* as a category 2 species (species for which data in the Service's possession indicate listing is probably appropriate, but for which additional biological information is needed to support a proposed rule). Along with *Opuntia basilaris* var. *treleasei* in category 1, *Eremalche kernensis* and *Eriastrum hooveri* were included with *Caulanthus californicus* in category 2 in the September 27, 1985, revised notice of review for plants (50 FR 39526).

Section 4(b)(3)(B) of the Endangered Species Act, as amended, requires the Secretary to make findings on certain pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This was the case for one of the southern San Joaquin Valley plants, *Opuntia treleasei*, because the 1975 Smithsonian report was accepted as a petition. In October 1983, 1984, 1985, 1986, 1987, and 1988, the Service found that proposed listing of *Opuntia treleasei* was warranted, but that the listing of this species was precluded due to other higher priority listing actions.

On July 27, 1989, the Service published in the Federal Register (54 FR 31201) a proposal to list *Caulanthus californicus*, *Eremalche kernensis*, *Lembertia congdonii*, and *Opuntia treleasei* as endangered, and *Eriastrum hooveri* as threatened. This proposal was primarily based on status surveys by Taylor and Davilla (1986) and Taylor (1987), and field work carried out by Chamberlain (U.S. Army Corps of Engineers 1986) and Mike Foster (botanist, California Energy Commission, pers. comm., November 24, 1987, January 22, 1988). The Service now determines *Caulanthus californicus*, *Eremalche kernensis*, *Lembertia congdonii*, and *Opuntia treleasei* to be endangered species, and *Eriastrum hooveri* to be a threatened species with the publication of this rule.

#### Summary of Comments and Recommendations

In the July 27, 1989, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. The public comment period ended on September 25, 1989. Appropriate State agencies, county and city governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices were published in the Bakersfield Californian on August 18, Fresno Bee on August 22, Porterville Recorder on August 17, Taft Midway Driller on August 21, Tulare Advance-Register on August 19, and Visalia Times Delta on August 19, 1989, which invited general public comment. No public hearing was requested or held.

Of the 19 comments received, the Service received nine comments during the comment period. Of the timely comments, the California Department of Fish and Game and California Native Plant Society were among three commentators expressing support for the listing proposal. Five letters were neutral and non-substantive, although these commentators generally requested locality data on known populations or inquired as to the possible effects of listing on their activities. One comment from the consultant to the Department of Energy opposed the listing of one of the five plants, *Eriastrum hooveri*. Three specific issues were raised in this letter and these comments are responded to below. None of the comments received after the close of the comment period opposed the listing of the five plants or contained critical information.

**Comment 1:** The loss of eleven historical populations does not suggest that the existence of *Eriastrum hooveri* is threatened.

**Service response:** According to Taylor and Davilla (1986), eleven of 39 populations known at the time of their study were lost primarily as a result of ag-land conversion and urbanization. At least one additional population has been lost since the publication of the study. Of the remaining 27 populations known to Taylor and Davilla (1986), they reported that oil and gas development, ag-land conversion, and/or urbanization threatened 20 populations. Of the additional ten populations reported by the Service in the proposed rule, eight are threatened by ag-land conversion or reservoir construction. Since the publication of the proposed rule, EG&G Energy Measurements (1988) released a

report on the distribution and status of Hoover's woolly-star and other "sensitive" species occurring on public land within the Elk Hills on the Naval Petroleum Reserve (NPR-1). EG&G (1988) located 28 populations on NPR-1, although two of these populations duplicated localities reported by Taylor and Davilla (1986). These additional 26 populations on NPR-1 are all subject to oil and gas development. Moreover, five of these populations are likely imminently threatened because they occur within a quarter-mile of existing well pads and accompanying sumps. Russ Lewis, a biologist with the Bureau of Land Management, surveyed the petroleum-rich lands bordering NPR-1, including the Buena Vista Valley and Buena Vista Hills in 1989. He reported (pers. comm., September 26, 1989) 79 populations harboring *E. hooveri*, all of which are threatened by oil and gas development. Because 24 of these populations had been previously located by EG&G (1988) on NPR-1, 55 of the populations reported by Lewis represent new sites. In light of these new data, 109 of the remaining 118 populations of *Eriastrum hooveri* are threatened by ag-land conversion, oil and gas development, urbanization, or reservoir construction.

**Comment 2:** *Eriastrum hooveri* grows on disturbed sites on NPR-1 and the species continues to persist in grazed areas and amid active oil and gas development. This observation suggests that *E. hooveri* will not become endangered within the foreseeable future throughout all or a significant portion of its range.

**Service response:** According to EG&G (1988), *Eriastrum hooveri* grows in areas free of dense annual herbs or grasses at NPR-1. Similarly, Taylor and Davilla (1986) reported that the species grew "where competing annuals are somewhat reduced in cover." The mechanism for reducing the grass cover varies within the range of *E. hooveri*. Where valley populations are restricted to patches of "cryptogamic crust" (Taylor and Davilla 1986), the largest populations within the Elk Hills on NPR-1 occur primarily in "formerly disturbed sites, particularly on or adjacent to abandoned or little-used roadways (EG&G 1988)." Because these dirt roads are rarely used, native shrubs and herbs, including *E. hooveri*, have recolonized many of these areas. The severe disturbance associated with overgrazed habitats or active oil field development is not analogous to the moderate and infrequent disturbance common to the rarely used roads on NPR-1. The apparent absence of the

species from areas affected by such severe disturbance suggests that *E. hooveri* does not persist in heavily grazed areas or amid active oil and gas development, but in historically or lightly disturbed to undisturbed habitats interspersed within lands modified by overgrazing and petroleum development. Though the response of *E. hooveri* to disturbance has not been determined experimentally (EG&G 1988), the available data indicate that the species would be threatened by increased grazing and expanded oil field development. Given the primary threats facing the valley (i.e., ag-land conversion, urbanization) and lower foothill populations (i.e., oil and gas development, overgrazing), *E. hooveri* likely will become an endangered species within the foreseeable future throughout all or a significant portion of its range.

**Comment 3:** In light of the 28 populations of *Eriastrum hooveri* known from NPR-1 and the Department of Energy's long-term active role in protecting listed wildlife on their lands, intensive oil and gas development on NPR-1 does not appear to have adversely affected the species over the past decade.

**Service response:** Given the absence of distributional data prior to the advent of oil and gas development, it is impossible to determine whether such activities resulted in the loss of *Eriastrum hooveri* populations. Whereas the species is confined to the lower slopes or borders of the reservation, most oil and gas development on NPR-1 has taken place at higher elevations along Skyline Road. As a result, only five of the 28 populations occur within a quarter of a mile of an existing well pad or its accompanying sump. Given that *E. hooveri* does not grow on severely degraded or developed sites and that the Department of Energy did use aggressive annual grasses in its revegetation program, oil and gas development and associated vegetation programs probably adversely affected the species on NPR-1. Although the Department of Energy has modified the revegetation program and the agency now surveys future oil development sites for Hoover's woolly-star, these policies do not fully protect for *E. hooveri* or other non-listed species on NPR-1. In addition, the Department of Energy policies provide no protection for the populations on non-Department land.

#### Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined

that *Caulanthus californicus*, *Eremalche kernensis*, *Lembertia congdonii* and *Opuntia treleasei* should be classified as endangered species; and that *Eriastrum hooveri* should be classified as a threatened species. Provisions set forth in section 4 of the Endangered Species Act and regulations promulgated to implement the listing provisions of the Act (50 CFR part 424) set forth the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Caulanthus californicus* (Watson) Payson (California jewelflower); *Eremalche kernensis* C.B. Wolf (Kern mallow); *Eriastrum hooveri* (Jepson) H.L. Mason (Hoover's woolly-star); *Lembertia congdonii* (Gray) Greene (= *Eatonella congdonii* Gray) (San Joaquin woolly-threads); and *Opuntia treleasei* Coulter (= *Opuntia basilaris* Engelmann & Bigelow var. *treleasei* (Coulter) Toumey) (Bakersfield cactus) are as follows:

**A. The present or threatened destruction, modification, or curtailment of its habitat or range.** All five species listed herein (*Caulanthus californicus*, *Eremalche kernensis*, *Eriastrum hooveri*, *Lembertia congdonii*, and *Opuntia treleasei*) are restricted to grassland and adjacent plant communities (valley sink scrub, valley saltbush scrub, and juniper woodland) in the southern San Joaquin Valley and neighboring foothills and valleys in California (see "Background" section for specific distributions). The primary threat facing these five species is the ongoing and threatened destruction and adverse modification of habitat. As discussed in the "Background" section, primarily ag-land conversion and urbanization have claimed 96 percent of the native habitats of the valley floor. The remaining non-urbanized or non-converted lands, which largely occur in the neighboring foothills and valleys (i.e., Carrizo Plain, Cuyama Valley), have been subject to livestock grazing, water development, oil and gas development and exploration, off-road vehicle use, mining, and/or other activities. These anthropogenic actions continue to threaten the native plant communities and habitats of these five species.

*Caulanthus californicus* was known from 47 sites in six counties (Fresno, Kern, Kings, San Luis Obispo, Santa Barbara, and Tulare), according to a status survey by Taylor and Davilla (1986) and recent field work by Lewis (pers. comm., September 26, 1989). Although once

described as "abundant on the plains of the San Joaquin from Tulare southward (Greene 1891)," the species is known today from three localized areas; the mouth of Santa Barbara Canyon in Santa Barbara County, the southern portion of Carrizo Plain in San Luis Obispo County, and the Paul Paine Preserve (owned by The Nature Conservancy) in Kern County. One population grows in Santa Barbara Canyon on private land, although the landowners have entered into voluntary agreements with The Nature Conservancy to protect the site (California Nature Conservancy 1987). Though no plants were observed at this site in 1987 (Taylor, pers. comm., February 21, 1987), several thousand plants were counted in the spring of 1988. The Carrizo Plain harbored a couple thousand individuals in 1988 (Mike Foster, pers. comm., March 14, 1988). However, this area contained 400 to 600 plants at eight isolated sites in 1989 (Lewis, pers. comm., September 26, 1989). Only two of the eight sites are on public land managed by the Bureau of Land Management and, thus, receive any protection from overgrazing. Taylor noted that the Paul Paine Preserve population, which is introduced, consisted of only 24 plants, of which only four plants flowered in 1988. Rainfall patterns probably account for the variation in population size for these colonies of *C. californicus*. Ag-land conversion likely claimed most of the valley floor sites due to the species' preference for sandy soils, which are prized for viticulture (Taylor and Davilla 1986). As suggested from herbarium records, livestock grazing probably claimed the remaining extirpated sites within the last few decades (see Factor "D" for further discussion). Moreover, trampling by livestock may have contributed to the endangerment of this species and *Eremalche kernensis*. Overgrazing may also threaten the other three species listed herein. In addition, Taylor and Davilla (1986) speculated that poor air quality may have contributed to the demise of *C. caulanthus* by promoting the growth of competing, pollution-tolerant plants (i.e., *Bromus rubens*).

*Eremalche kernensis* was known from six sites in western Kern County, according to herbarium and field records detailed in the status survey by Taylor and Davilla (1986). Oil and gas development likely extirpated the type locality of the species in the Temblor Valley. Another site of *E. kernensis*, 5 miles north of Lost Hills, was probably eliminated by ag-land conversion. In addition, construction of the California

Aqueduct may have eliminated some unknown populations of the species. Three of the remaining four known occurrences exist on private land less than 5 miles from the South Belridge and Cymric Oil Fields and in the vicinity of transmission corridors (Taylor and Davilla 1986). Aside from maintenance or expansion of these corridors, future telecommunication and electrical line construction, and oil and gas development and exploration may threaten these remaining sites. One population north of McKittrick occurs on public land managed by the Bureau of Land Management. Though the agency has not undertaken any special management of the site, the Bureau of Land Management gives limited management consideration to candidate species. Nonetheless, this site still may be used for a variety of public uses (e.g., mineral extraction, oil and gas development, livestock grazing). All populations occur in areas grazed by sheep in the winter and spring. Taylor and Davilla (1986) concluded, "(u)ncolonized and heavy sheep grazing would be detrimental to *E. kernensis*."

*Lembertia congdonii* was known from 52 sites in seven counties (Fresno, Kern, Kings, San Benito, San Luis Obispo, Santa Barbara, and Tulare), according to herbarium and field records, and a recent status survey (Taylor 1987; Foster, pers. comm., March 14, 1988). Habitat alteration, principally due to ag-land conversion, eliminated 33 of these sites, including the type locality and only known population in Tulare County. Of the remaining 19 sites, Taylor (1987) observed the species growing at six of these localities in either 1986 or 1987, and Foster (pers. comm., March 14, 1988) found an additional three populations in 1988. Population size ranged from 20 to 300 plants, the largest stand scattered over approximately 100 acres. Although no plants were located at the other ten localities, Taylor (1987) reported that these sites still have suitable habitat. Although three of the 19 sites presumably harboring *L. congdonii* are on public land managed by the Bureau of Land Management, the agency has not undertaken any special management of these localities. Although the Bureau gives limited management consideration to candidate species, these sites still may be used for a variety of public uses (e.g., mineral extraction, oil and gas development, livestock grazing). Another population presumably still persists at Sand Ridge east of Bakersfield. Although The Nature Conservancy owns a 120-acre parcel on Sand Ridge, the northern portion of this

area remains in private ownership. Off-road vehicle use, sand mining, and a proposed flood control project by the U.S. Army Corps of Engineers variously threaten all of this area. Portions of two populations were acquired by The Nature Conservancy as part of their Carrizo Plain Natural Heritage Preserve in early 1988. On August 30, 1988, the California Department of Water Resources purchased lands within the largely abandoned Strand and Canal Oil Fields, as part of the Kern Water Bank Project, that harbor the three populations found by Foster. The remaining portions of three sites owned in part by The Nature Conservancy and the other ten populations are privately-owned and adjacent to lands that have been or continue to be urbanized, converted to agriculture, developed for oil and gas extraction and conveyance, or affected by off-road vehicles and grazing livestock. Similar activities are likely to continue in the near future.

*Opuntia treleasei* "once grew in dense almost impenetrable colonies on the mesas east of Bakersfield," according to Wisselmann (1969). However, ag-land conversion (primarily for the production of potatoes and cotton), oil development, sand mining, urbanization, and perhaps wildfire have reduced this formerly widespread species to numerous, small isolated colonies. As discussed in the "Background" section, these colonies can be divided into five general population areas. Primarily urbanization and oil and gas development threaten the colonies northeast of Oildale, the northernmost population. Though energy development affects somewhat the population along the Kern River Bluffs northeast and east of Bakersfield, this area is rapidly being converted to housing for the ever-expanding population of Bakersfield. The construction of a small hydroelectric project and its associated accidental wildfire affected a few plants within the Kern River floodplain northeast of Bakersfield and east of Lake Ming. Off-road vehicle use, sand mining, and perhaps livestock overgrazing threaten the colonies on the bluffs and rolling hills west and north of Caliente Creek, the population located within the center of the species' range. Because the cactus provides no forage for livestock and competes with the alien grasses, ranchers may undertake eradication programs that may adversely affect the species. As discussed under *Lembertia congdonii*, The Nature Conservancy owns a portion of the Sand Ridge colony along the bluffs of Caliente Creek. However, a proposed flood control project likely will

eliminate some individuals in the Sand Ridge area, including many plants on property owned by The Nature Conservancy. The Tejon Ranch, which is aware of the solitary clump of *O. treleasei* on the ranch, has not expressed any plans to eliminate the cactus at Comanche Point. This population, however, is less than 4 miles from the Comanche Point Oil Field, which suggests the site may be subject to future oil and gas exploration. Ag-land conversion, aqueduct and transmission line maintenance, off-road vehicle use, urbanization, road widening, and illegal dumping threaten the remaining isolated colonies northwest of the community of Wheeler Ridge (Foster, pers. comm., January 22, 1988), although one population grows on land owned by the State of California and administered by the California Department of Water Resources. In addition, the North Tejon Oil Field affects much of the Wheeler Ridge area.

*Eriastrum hooveri* was known from 130 sites in four counties (Fresno, Kern, San Luis Obispo, and Santa Barbara), as discussed in the "Summary of Comments and Recommendations" section. Primarily ag-land conversion and urbanization eliminated twelve of these sites. Of the remaining 118 sites, nine are either protected within preserves (i.e., Paul Paine Preserve, Alkali Sink Ecological Preserve) or located in undeveloped foothills (i.e., Temblor Range or Alcala Hills). Overgrazing poses the only potential threat to the latter populations. The remaining 109 populations are threatened by various activities. For example, a proposed reservoir, as part of Arroyo Pasaajero Project, threatens a large population along Warthan Creek in Fresno County (Lacey and Janeway 1987; Arthur Gooch, California Department of Water Resources, pers. comm., July 22, 1988). Future oil and gas development in the Elk Hills and adjacent areas may damage or destroy 28 populations on NPR-1, five populations on Naval Petroleum Reserve #2 (NPR-2), six sites on public land managed by the Bureau of Land Management, and 44 sites on private land. Although the Department of Energy, which manages NPR-1 and NPR-2, implemented policies to protect resources, these policies do not fully protect for *E. hooveri* or any non-listed species on the reserves. Similarly, the Bureau of Land Management gives management consideration to non-listed species. However, this policy does not necessarily prevent these sites from being used for a variety of purposes, including oil and gas development,

mineral extraction, and livestock grazing. The remaining 27 sites occur predominantly on the valley floor on private property. Typically these sites are on small, irregularly shaped parcels surrounded by ag-land and/or urban areas, which are often adjacent to roads. Although some of these sites harbor substantial populations (5,000-40,000 plants), most of the remaining sites on the valley floor consist of 5-1,000 individuals and range from approximately an acre to less than 400 acres in size. Though many of these privately owned sites are perhaps too small to farm economically, parcels such as these continue to be converted to ag-land. Moreover, urbanization, conversion of habitat for ground-water recharge basins or disposal of nutrient-laden agricultural effluent, off-road vehicle use, and oil and gas development continue to threaten the privately owned populations (Taylor and Davilla 1986).

**B. Overutilization for commercial, recreational, scientific, or educational purposes.** Although not necessarily applicable to these species, many cacti are collected and cultivated by plant collectors, or offered for sale or trade by cactus growers. Though no data exist demonstrating such commerce in *Opuntia treleasei*, the species may still be collected and cultivated.

**C. Disease or predation.** As suggested from herbarium records and the species palatability, livestock grazing probably extirpated colonies of *Caulanthus californicus* growing in the foothills and valleys adjoining the southern San Joaquin Valley. The adverse effects associated with trampling by livestock are discussed under Factor "A". Overgrazing may also threaten the other three species proposed listed herein.

**D. The inadequacy of existing regulatory mechanisms.** Under the Native Plant Protection Act (Chapter 1.5 § 1900 *et seq.* of the Fish and Game Code) and California Endangered Species Act (Chapter 1.5 § 2050 *et seq.*), the California Fish and Game Commission has listed *Caulanthus californicus* and *Opuntia treleasei* as endangered (14 California Code of Regulations § 670.2). Though both statutes prohibit the "take" of State-listed plants (Chapter 1.5 §§ 1906 and 2080), State law appears to exempt the taking of such plants via habitat modification or land use change by the landowner. After the California Department of Fish and Game notifies a landowner that a State-listed plant grows on his or her property, State law evidently requires only that the landowner notify the agency "at least 10

days in advance of changing the land use to allow salvage of such plant." (Chapter 1.5 § 1913)

*Opuntia treleasei*, like all Cactaceae from the Americas not listed separately under Appendix I, was included under Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) on July 1, 1975. Although CITES regulates the international trade of listed species, commercial trade is not currently a threat to *Opuntia treleasei*. Thus, CITES listing does not provide real protection for this species.

**E. Other natural or manmade factors affecting its continued existence.** The invasion of alien, annual grasses has adversely affected all of the remaining "natural" areas since the days of the Franciscan missionaries. These alien grasses, which account for 50 to 90 percent of the vegetative cover (Heady 1956) and can stand up to a meter in height (Holland 1986), largely dominate grasslands of California. As discussed in the "Background" section, the exotic annuals may alter the natural fire regime and these plants have either outcompeted or continue to compete with the native flora.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to make this rule final. Based on this evaluation, the preferred action is to list *Caulanthus californicus*, *Eremalche kernensis*, *Lembertia condonii*, and *Opuntia treleasei* as endangered, and to list *Eriastrum hooveri* as threatened.

*Caulanthus californicus*, *Eremalche kernensis*, *Lembertia condonii*, and *Opuntia treleasei* have been extirpated from all but a small fraction of their historical ranges. Today these species generally persist as small, isolated populations or colonies surrounded by ag-land, urban areas, oil fields, and/or roads. Competition from alien grasses probably has and continues to adversely affect these species, especially the three annual herbs (*Caulanthus californicus*, *Eremalche kernensis*, and *Lembertia condonii*). Although The Nature Conservancy owns an introduced population of *Caulanthus californicus* and has landowner agreements securing another site harboring the plant (California Nature Conservancy 1987), overgrazing and stochastic events affecting such extremely small populations still may result in the extinction of this species. All four remaining populations of *Eremalche kernensis* occur within a solitary township north of McKittrick, which

may be adversely affected by livestock trampling, transmission corridor maintenance or expansion, telecommunication and electrical line construction, and oil and gas development or exploration. The remaining 19 sites of *Lembertia congdonii* are variously threatened by ag-land conversion, urbanization, conversion of habitat for ground-water recharge basins or disposal of agricultural effluent, livestock overgrazing, off-road vehicle use, and/or oil and gas development and exploration. Two populations of *Caulanthus californicus*, one of *Eremalche kernensis*, and three populations of *Lembertia congdonii* are known to occur on public land managed by the Bureau of Land Management. Although the Bureau accords limited management consideration to non-listed species, this policy does not prevent the use of these sites for a variety of activities (e.g., mineral extraction, oil and gas development, livestock grazing). The relicual colonies of *Opuntia treleasei* are imminently threatened by ag-land conversion, oil development, sand mining, urbanization, off-road vehicle use, construction of flood control basins, aqueduct and transmission line maintenance, road widening, illegal dumping, and/or potential alterations in the natural fire regime. Because these four plants are in danger of extinction throughout all or a significant portion of their ranges, they fit the definition of endangered as defined in the Act.

*Eriastrum hooveri* has been extirpated, principally as a result of ag-land conversion and urbanization, from 12 of its 130 known sites. Of the remaining 118 sites, nine sites are in preserve status or located in the remote higher portions of the foothills (i.e., Temblor Range or the Alcalde Hills). Overgrazing poses the only tangible threat to these foothill populations. Of the remaining 109 populations, 39 occur on public land managed by either the Bureau of Land Management or Department of Energy. These sites remain vulnerable to a variety of public uses (e.g., mineral extraction, oil and gas development, and livestock grazing). The remaining 70 populations are located on privately owned parcels and are threatened by ag-land conversion, urbanization, conversion of habitat for ground-water recharge basins or disposal of agricultural effluent, off-road vehicle use, and oil and gas development and exploration (Taylor and Davilla 1986). Although the number of extant populations (118), including those located on private land, provides greater flexibility in recovery and

reduces the likelihood that the species will go extinct in the immediate future, 92 percent of the extant populations of *E. hooveri* are variously threatened. Because of the limited threats facing the foothill populations of *E. hooveri* and the likelihood additional occurrences may be found in these upland areas, this species is not now in immediate danger of extinction throughout all or a significant portion of its range. However, *E. hooveri* is likely to become in danger of extinction in the near future. As a result, *E. hooveri* fits the definition of threatened species as defined in the Act.

#### Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that determination of critical habitat is not prudent for these species at this time. Because the five species face numerous anthropogenic threats (see Factor A in "Summary of Factors Affecting the Species") and occur predominantly on private land, the publication of precise maps and descriptions of critical habitat in the *Federal Register* would make these plants more vulnerable to incidents of vandalism and, therefore, could contribute to the decline of these species. The listing of these species as either endangered or threatened also publicizes the rarity of these plants and, thus, can make these plants attractive to researchers or collectors of rare plants. The proper agencies have been notified of the locations and management needs of these plants. Landowners will be notified of the location and importance of protecting habitat of these species. Protection of these species' habitats will be addressed through the recovery process and through the section 7 consultation process. The Service believes that Federal involvement in the areas where these plants occur can be identified without the designation of critical habitat. Therefore, the Service finds that designation of critical habitat for these plants is not prudent at this time. Such designation likely would increase the degree of threat from vandalism, collecting, or other human activities.

#### Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition

through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires development and implementation of recovery plans. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. Two populations of *Caulanthus californicus*, one of *Eremalche kernensis*, and three populations of *Lembertia congdonii* occur on public land managed by the Bureau of Land Management. Thirty-nine populations of *Eriastrum hooveri* occur on public land managed by either the Bureau of Land Management or Department of Energy. Though some other stands occur near Federal land, all of the remaining known sites are on private land with no known Federal involvement with the following exceptions. The U.S. Army Corps of Engineers and the Bureau of Reclamation may fund or develop, at least in part, proposed flood control or water projects. Because of potential impacts to two federally listed animals, San Joaquin kit fox (*Vulpes macrotis mutica*) and blunt-nosed leopard lizard (*Gambelia silus*), the Corps has consulted formally on a proposed flood control project for Caliente Creek. However, this project probably would eliminate numerous individuals of *Opuntia treleasei* from the Sand Ridge colony, which grows on the bluffs

adjoining the creek (U.S. Army Corps of Engineers 1986). Other potential Federal actions include new allocations of water through existing Federal facilities (e.g. Bureau of Reclamation's Central Valley Project), which could increase ag-land conversion and possibly affect one or more of these five plant species.

Activities involving Federal mortgage programs, including those of the U.S. Department of Agriculture (Farmers Home Administration), Veterans Administration, and U.S. Department of Housing and Urban Development (Federal Home Administration loans), may be subject to section 7 review.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 for endangered species and 17.71 and 17.72 for threatened species set forth a series of general trade prohibitions and exceptions that apply to all endangered and threatened plant species. With respect to the five plants from the southern San Joaquin Valley, all trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 and 17.71, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export; transport in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale these species in interstate or foreign commerce; or to remove and reduce to possession these species from areas under Federal jurisdiction, maliciously damage or destroy the species on any such area, or remove, cut, dig up, damage or destroy the species on any other area in knowing violation of State law or regulation, or in the course of any violation of a State criminal trespass law. Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. Certain exceptions can apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62, 17.63, and 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered and threatened species under certain circumstances. The Service anticipates few trade permits would ever be sought or issued for the five species, with the possible exception of *Opuntia treleasei* which, like other cacti, may be in cultivation. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/358-2104).

As a species of the Cactaceae (Cactus family), *Opuntia treleasei* is included in Appendix II of the CITES Convention (see 50 CFR 23.23). The effect of this listing under the CITES Convention is that permits or certificates are required for exportation or importation of *Opuntia treleasei*. Such CITES Convention restrictions are intended to prevent international trade from being detrimental to the survival of listed species.

#### National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined by the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

#### References Cited

- Abrams, L., and R.S. Ferris. 1960. Illustrated flora of the Pacific states. Vol. IV. Stanford Univ. Press.
- Al-Shehbaz, I.A. 1973. The biosystematics of the genus *Thelypodium* (Cruciferae). Contr. Gray Herb. 204:1-148.
- Bakker, E.S. 1971. An island called California. Univ. Calif. Press, Berkeley.
- Bartolome, J.W., and B. Gemmill. 1981. The ecological status of *Stipa pulchra* (Poaceae) in California. Madroño 28:172-184.
- Benson, L. 1969. The native cacti of California. Stanford Univ. Press.
- Benson, L. 1982. The cacti of the United States and Canada. Stanford Univ. Press.
- Biswell, H.H. 1956. Ecology of California grasslands. J. Range Manage. 9:19-24.
- Britton, N.L., and J.N. Rose. 1920. The Cactaceae. 4 vol., Carnegie Inst. Washington Publ. 248, Washington, D.C.
- Brown, D.E. 1982. 143.2 Californian valley grassland. Desert Plants 4:132-135.
- California Nature Conservancy. 1987. Landowners protect rare wildflower. Autumn Newsletter:3.
- Clements, F.E. 1934. The relict method in dynamic ecology. J. Ecology 22:39-68.
- Coulter, J.M. 1896. Preliminary revision of the North American species of *Echinocactus*, *Cereus*, and *Opuntia*. Contr. U.S. Nat. Herb. 3:434.
- EG&G Energy Measurements. 1988. The occurrence and status of candidate species listed by the U.S. Fish and Wildlife Service on Naval Petroleum Reserve #1, Kern County, California. Unpublished report, EGG 10617-2015, 62 pp.
- Gray, A. 1883. Contributions to North American botany. Proc. Amer. Acad. Arts Sci. 19:1-96.
- Greene, E.L. 1891. Fl. Fran. 256.
- Greene, E.L. 1897. Fl. Fran. 441.
- Griffiths, D., and R.F. Hare. 1908. Prickly pear and other cacti. N. Mex. Agr. Exp. Sta. Bull. 60:81.
- Heady, H.F. 1956. Evaluation and measurement of the California annual type. J. Range Manage. 9:25-27.
- Heady, H.F. 1977. Valley grassland. In: Barbour, M.G., and J. Major (eds.), Terrestrial vegetation of California. John Wiley and Sons, New York.
- Holland, R.F. 1988. Preliminary descriptions of the terrestrial natural communities of California. Unpublished report, California Department of Fish and Game. 156 pp.
- Hoover, R.F. 1970. The vascular plants of San Luis Obispo County, California. Univ. Calif. Press, Berkeley.
- Jepson, W.L. 1943. A flora of California. Vol. III. Jepson Herbarium and Library, Univ. Calif., Berkeley.
- Kearney, T.H. 1956. Notes on Malvaceae. VIII. *Eremalche*. Madroño 13:241-243.
- Lacey, J., and L.P. Janeway. 1987. Arroyo Pasajero Project vegetation studies progress report, 1986-1987 field studies. Unpublished report, California Department of Water Resources, Northern District. 38 pp.
- Leonelli, S. 1988. An investigation of the taxonomic status of *Eremalche kernensis* C.B. Wolf (Malvaceae). Unpublished M.S. thesis, Calif. State Univ., Long Beach.
- Mason, H.L. 1945. The genus *Eriastrum* and the influence of Bentham and Hooker upon the problem of generic confusion in the Polemoniaceae. Madroño 8:65-91.
- McNaughton, S.J. 1968. Structure and function in California grasslands. Ecology 49:962-972.
- Munz, P.A. 1959. A California flora. Univ. Calif. Press, Berkeley.
- Munz, P.A. 1968. Supplement to a California flora. Univ. Calif. Press, Berkeley.
- Munz, P.A., and D.D. Keck. 1950. California plant communities-supplement. Aliso 2:199-202.
- Ornduff, R. 1974. An introduction to California plant life. Univ. Calif. Press, Berkeley.
- Payson, E.B. 1923. A monograph of *Thelypodium* and its immediate allies. Ann. Missouri Bot. Gard. 9:233-324.
- Piemeisel, R.L., and F.R. Lawson. 1937. Types of vegetation in the San Joaquin Valley of California and their relation to the beet leafhopper. U.S.D.A. Tech. Bull. No. 557, Washington, D.C.
- Preuss, C. 1844. Exploring with Fremont.
- Taylor, D.W. 1987. Status survey of San Joaquin woolly-threads (*Lambertia congonii*). U.S. Fish and Wildlife Service, Sacramento, Calif.
- Taylor, D.W., and W.B. Davilla. 1986. Status survey of three plants endemic to the San Joaquin Valley. U.S. Fish and Wildlife Service, Sacramento, Calif.
- Toumey, J.W. 1901. *Opuntia*. In: Bailey, Cyclop. Hort. 4:1147.
- Twisselmann, E.C. 1958. Flora of Temblor Range and the neighboring part of the San Joaquin Valley. Wassmann J. Biol. 14:161-300.
- Twisselmann, E.C. 1969. Status of the rare plants of Kern County. Calif. Native Plant Soc. Newsletter 5(3):1-7.
- U.S. Corps of Engineers. 1988. Caliente Creek stream group investigation. Unpublished report, U.S. Corps of Engineers, Sacramento, Calif.

Watson, S. 1880. Botany of California. University Press, Cambridge, Mass.

Wester, L. 1981. Composition of native grasslands in the San Joaquin Valley, California. *Madroño* 28:231-241.

White, K.L. 1967. Native bunch grass (*Stipa pulchra*) on Hastings Reservation, California. *Ecology* 48:949-955.

Wiggins, I.L. 1951. Malvaceae. In: Abrams, L., Illus. Flora Pacific States. III. Stanford Univ. Press.

Wolf, C.B. 1938. California plant notes II. Occasional Papers Rancho Santa Ana Bot. Gard. Ser. I, No. 2:64-68.

#### Author

The primary author of this final rule is

Jim A. Bartel (see ADDRESSES section, 916/978-4866, FTS 460-4866).

#### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record-keeping requirements, and Transportation.

#### Regulations Promulgation

#### PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1543; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.12(h) by adding the following, in alphabetical order under the families indicated, to the List of Endangered and Threatened Plants:

#### § 17.12 Endangered and threatened plants.

(h) \* \* \*

Scientific name	Species Common name	Historic range	Status	When listed	Critical habitat	Special rules
Asteraceae—Aster family:						
<i>Lambertia congonifolia</i>	San Joaquin woolly-threads	U.S.A. (CA)	E	395	NA	NA
Brassicaceae—Mustard family:						
<i>Caulanthus californicus</i>	California jewelflower	U.S.A. (CA)	E	395	NA	NA
Cactaceae—Cactus family:						
<i>Opuntia treleasei</i>	Bakersfield cactus	U.S.A. (CA)	E	395	NA	NA
Malvaceae—Mallow family:						
<i>Eremalche kernensis</i>	Kern mallow	U.S.A. (CA)	E	395	NA	NA
Polemoniaceae—Phlox family:						
<i>Eriastrum hooveri</i>	Hoover's woolly-star	U.S.A. (CA)	T	395	NA	NA

Dated: June 29, 1990.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 90-16814 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-55-M

#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

#### 50 CFR Part 642

[Docket No. 900495-0175]

RIN 0648-AC77

#### Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: NOAA issues this final rule to implement Amendment 5 to the

Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). This rule (1) Extends the management area for Atlantic migratory groups of king and Spanish mackerel through the Mid-Atlantic Fishery Management Council's area of authority, that is, the exclusive economic zone (EEZ) off the States of New York through Virginia; (2) revises the fishing year for Gulf migratory group Spanish mackerel; (3) revises the definition of "overfishing," adds a separate definition of "overfished," and adds a definition of "conflict;" (4) makes the South Atlantic Fishery Management Council responsible for pre-season adjustments of total allowable catch and bag limits for the Atlantic Management Council responsible for such adjustments for the Gulf migratory groups of king and Spanish mackerel; (5) specifies that the earned income requirement to qualify for an annual permit for a vessel owned by a corporation or partnership must be met by a shareholder or officer of the

corporation, a general partner of a partnership, or the vessel operator; (6) redefines recreational bag limits from trip limits to daily bag limits; (7) prohibits the use of gear other than hook and line and run-around gill nets to fish in the EEZ for king mackerel from the Gulf migratory group; (8) imposes a daily bag limit of two cobia per person; (9) establishes a minimum size limit of 12 inches (30.48 centimeters) fork length or 14 inches (35.56 centimeters) total length for king mackerel and requires that king mackerel be landed with head and fins intact; (10) removes the provision allowing sale of mackerel taken under a bag limit; (11) charges a fee to cover the administrative costs of issuing permits; (12) clarifies the requirement that fish subject to a minimum size limit must be landed with head and fins intact; and (13) makes minor corrections and clarifications to the regulations and conforms them to current usage. The intended effects are to continue rebuilding the king and

Spanish mackerel resources, provide additional protection for cobia and other coastal migratory pelagic fish, provide equitable access to the available king and Spanish mackerel, improve the management regime, and correct and clarify the regulations.

**EFFECTIVE DATE:** August 20, 1990.

**FOR FURTHER INFORMATION CONTACT:** Mark F. Godcharles, 813-893-3722.

**SUPPLEMENTARY INFORMATION:** The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the FMP, prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and its implementing regulations at 50 CFR part 642, under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1801 *et seq.*

Amendment 5 is a major revision of the FMP. It substantially changes the description of the problems in the fishery that the FMP addresses and updates the objectives of the FMP. The revised problems and objectives and the regulatory changes to address the problems and pursue the objectives were discussed in the proposed rule (55 FR 14981, April 20, 1990) and are not repeated here.

In addition to the changes contained in Amendment 5, NOAA is making changes to (1) Clarify the time required to obtain a permit, (2) implement a fee for permits, and (3) clarify the requirement that fish subject to a minimum size limit must be landed in a whole condition. The specific changes were discussed in the proposed rule and are not repeated here.

#### Comments and Responses

Comments were received during the comment period from three commercial fishermen, a seafood dealer, a charterboat company, and a fishing club. Most of the comments opposed specific Amendment 5 actions and focused on the eligibility requirements for corporate-owned vessels to obtain permits, annual permit fees, gear restrictions for the Gulf group king mackerel, daily bag/possession limits for cobia and mackerels, and the 12-inch minimum size restriction for king mackerel. Summarized comments and responses by subject follow.

#### Bag Limits

**Comments:** Two respondents expressed opposition to including commercial fishermen under the two-fish cobia bag limit but supported its imposition on the recreational fishery.

They contend that only a small number of commercial fishermen rely on cobia for infrequent seasonal catches as an important revenue source. These commercial catches, they believe, are insignificant compared to the recreational catch such that continued commercial access to this resource above the proposed two-fish bag limit would not significantly affect stocks.

One respondent opposed the changing of bag limits from trip limits to daily bag/possession limits. He believes that daily limits will reduce repeat diurnal charterboat hiring and that such limitations are unfair and inappropriate in view of the thousands of pounds of mackerel captured in a single gillnet haul.

**Response:** NOAA supports the two fish bag limit for cobia and agrees with the Councils' rationale. Available data indicate that only a small fraction of fishing trips landed two or more cobia. Also, the Councils believe that most commercial landings were produced by recreational fishermen who sold their catch. Landings information further indicated to the Councils that cobia are an infrequent and opportunistic catch, rather than a targeted catch, and thus provide an income supplement. Therefore, limiting commercial catches to the two-fish bag limit should affect only a small percentage of fishing trips while still providing some supplementary income. The economic effects appear to be minimal, reasonable, and necessary to protect and rebuild the stocks. The effects eventually may be reduced, if the two-fish bag limit improves stock conditions to levels that would support greater fishing mortality, i.e., higher bag limits.

NOAA supports daily bag/possession limits for mackerels and cobia. Daily bag limits establish a reasonable, responsible, and conservative harvest standard for all anglers throughout the management area. They are also compatible with the regulations recently implemented under the Fishery Management Plan for the Reef Fish Fishery of the Gulf of Mexico and with certain state possession/landing laws. Trip limits provide an unfair advantage to those users who have easy, short-distance access to fishing grounds. Recreational participants in the fishery for coastal migratory pelagic resources take up to 75 percent of the annual mackerel harvest. Their catches appear to be insignificant on a per angler basis and when compared to the considerably larger daily landings of commercial vessels. However, on an aggregate basis, the additional harvest resulting from multiple trips during a day accelerates attainment of annual

allocations and subsequent implementation of zero bag limits for overfished mackerel groups—a distinct disadvantage to a large portion of the estimated 1–2 million recreational fishermen.

#### Commercial Permits

**Comments:** Three respondents objected to the individual income requirements necessary for a charter vessel to qualify for a commercial permit and the \$23 annual fee for permits. Specifically, one representative of the charter boat industry expressed opposition to permitting vessels through the qualifying incomes of operators rather than directly through the corporation's income. He considers this a disadvantage because qualified operators who can satisfy the income requirements are irregularly available, particularly to charter vessels operating in seasonal fisheries. Conversely, one permitted commercial mackerel fishermen favored permitting vessels only through the operator's income. One respondent questioned the \$23 annual fee when a \$10 fee was previously indicated and inquired as to the disposition of the resulting revenues; whereas, another opposed the initiation of any permit fee.

**Response:** NOAA supports the more specific requirements clarifying who must meet the earned income requirement for a commercial permit when a vessel is owned by a corporation. The requirements are designed to permit only those vessels whose owners or operators are legitimate participants in commercial mackerel fisheries and to disqualify those who have incorporated solely for the purposes of circumventing the regulations and the intent of the Councils and the NMFS.

When the mackerel permit system was implemented in August 1985, a fee of \$10 per permit was estimated but not implemented. Under the Magnuson Act, fees for permits are permissible but must not exceed the administrative cost of issuing the permit. Recent analysis indicates the current administrative cost is \$23. NOAA believes that this amount is fair and equitable, and can be reasonably borne by participants in the fishery. Permit fees are deposited into the general funds of the U.S. Treasury.

#### Gear and Size Restrictions

**Comments:** Three commercial fishermen commented on restricting the harvest of the Gulf group king mackerel only to hook-and-line gear and run-around gillnets, and the minimum size limit of 12 inches, fork length, for king

mackerel. Two supported the gear restrictions but suggested the need for further regulations that would establish separate quotas for these gears under the commercial allocation and thus protect commercial hook-and-line fishermen from excessive harvest by more efficient gillnet vessels. The third fisherman disapproved of the gear restrictions because he supports the prohibition of all nets in fisheries for Gulf and Atlantic groups of king and Spanish mackerel. One of the three contended that the 12-inch minimum size limit was insufficient to protect king mackerel and suggested that it be doubled to 24 inches fork length.

**Response:** NOAA believes that restricting the harvest of Gulf group king mackerel specifically to hook-and-line gear and run-around gillnets is necessary. Both gear types historically have been active in the fishery, and to protect their share of harvest under the current reduced allocations, the prohibition of additional and potentially more efficient gear types is justified. Similar rationale supported prohibition of purse seines and drift gillnets from this fishery. To provide fair and equitable harvesting access for the two permitted gear types, the Councils considered additional management measures, including separate commercial gear quotas. The Councils elected not to include separate gear quotas in Amendment 5.

Although the 12-inch size restriction will offer some benefit to king mackerel, it will principally benefit the Spanish mackerel resource by increasing enforceability of the same minimum size restriction for that species. Most mackerel under the 12-inch minimum are taken in the directed Spanish mackerel fishery and differentiating king and Spanish mackerel of this small size is difficult. Therefore, a 12-inch size minimum for both species will discourage harvest of undersized fish and eliminate enforcement problems arising from misidentification.

#### Changes From the Proposed Rule

A definition of *Councils* is added to clarify the use of that term in the regulations.

To further clarify who must meet the ten-percent earned income from fishing requirement for an annual vessel permit, language is added to cover ownership of a vessel by a partnership. Similar to a corporate-owned vessel, the earned income requirement must be met by a general partner.

Language is added to § 642.4(d) to specify that fees will be charged for permits beginning with those issued for

the permit year that commences April 1, 1991.

In the proposed rule, minimum size limits for king mackerel and cobia and gillnet minimum mesh sizes were stated in inches and, parenthetically, in centimeters to the nearest tenth of a centimeter. For enforcement purposes, NOAA cannot afford any discrepancy between the English (inches) and metric (centimeters) equivalents. Accordingly, the metric equivalents for the minimum sizes are stated in this final rule to the nearest hundredth of a centimeter. Authorized officers will measure fish and gillnets using the English system of measurement (inches) for the purpose of determining compliance with those limits.

In § 642.23(a)(2) and § 642.24(c), the word "incidental" is added before "catch allowance" in the headings to describe more clearly the contents of those paragraphs.

In § 642.24, in paragraph (a)(2)(ii), as an exception to the prohibition on possession of certain fish aboard a vessel with prohibited gear aboard, a reference to the purse seine incidental catch allowance of paragraph (c) of that section is added for clarity.

For consistency, the phrase "gill net" or "gill nets" is revised to read "gillnet" or "gillnets" throughout 50 CFR part 642.

Extension of the management area for Atlantic migratory groups of king and Spanish mackerel through the mid-Atlantic states requires the addition of statistical reporting grids to report the area fished. Accordingly, in Appendix A to part 642, that part of Figure 3 showing Statistical Grids for the South Atlantic is revised.

#### Approval and Implementation of Amendment 5

The Secretary of Commerce (Secretary) has approved Amendment 5 to the FMP which is implemented by this final rule. While this rule is effective on August 20, 1990, for the purpose of monitoring allocations, the revised fishing year for Gulf group Spanish mackerel and the extension of the management unit for Atlantic group king and Spanish mackerel into the EEZ off the mid-Atlantic states commenced April 1, 1990.

In addition to the changes proposed in this rule to the section on bag and possession limits (§ 642.28), the preliminary notice of change in the total allowable catch, allocations, quotas, and bag limits proposes changes to the bag limits for Gulf group Spanish mackerel. (See 55 FR 25986, June 26, 1990.)

#### Classification

The Secretary determined that Amendment 5 is necessary for the conservation and management of the coastal migratory pelagic resources and is consistent with the Magnuson Act and other applicable law.

The Under Secretary for Oceans and Atmosphere, NOAA, determined that this rule is not a "major rule" requiring the preparation of regulatory impact analysis under E.O. 12291. This rule is not likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographical regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic markets.

The Councils prepared a regulatory impact review (RIR) for Amendment 5. A summary of the economic effects was included in the proposed rule.

The RIR prepared by the Councils concludes that this rule will not have a significant economic impact on a substantial number of small entities. The basis for this conclusion was summarized in the proposed rule. Accordingly, the General Counsel of the Department on Commerce certified to the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis was not prepared.

The Councils prepared an environmental assessment (EA) that discusses the impact of Amendment 5 on the environment. Based on the EA, the Assistant Administrator for Fisheries, NOAA, concluded that there will be no significant adverse impact on the human environment as a result of this rule.

The Councils have determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal zone management programs of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Florida, Alabama, Louisiana, and Mississippi. Georgia and Texas do not have approved coastal zone management programs. These determinations were submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. New Jersey,

Pennsylvania, Delaware, North Carolina, South Carolina, Florida, and Louisiana agreed with this determination. None of the other states responded within the statutory time period and, therefore, consistency is automatically implied.

This rule does not contain a new collection-of-information requirement for purposes of the Paperwork Reduction Act. However, expansion of the management area will affect two information collections approved under Office of Management and Budget control numbers 0648-0013 and 0648-0205.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

#### List of Subjects in 50 CFR Part 642

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: July 13, 1990.

James E. Douglas, Jr.,

Acting Assistant Administrator for Fisheries,  
National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 642 is amended as follows:

#### PART 642—COASTAL MIGRATORY PELAGIC RESOURCES OF THE GULF OF MEXICO AND SOUTH ATLANTIC

1. The authority citation for part 642 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 642.1, paragraph (b) is revised to read as follows:

##### § 642.1 Purpose and scope.

(b) This part governs conservation and management of—

(1) King and Spanish mackerel off the Atlantic coastal states south of the New York/Connecticut border and off the Gulf of Mexico coastal states; and

(2) All other coastal migratory pelagic fish off the Atlantic coastal states south of the Virginia/North Carolina border and off the Gulf of Mexico coastal states.

3. In § 642.2, the definition of *Overfishing* or *overfished* is removed and new definitions of *Conflict*, *Councils*, *EEZ*, *Overfished*, and *Overfishing* are added in alphabetical order to read as follows:

##### § 642.2 Definitions.

*Conflict* means an incident at sea involving one or more fishing vessels—

(a) In which contact between one fishing vessel or its gear with another vessel or gear results in damage or

destruction of fishing gear, loss of gear and associated catch through disappearance of the gear or its location buoys, preemption of fishing grounds, removal of catch from the gear, or vessel collision;

(b) In which there is imminent threat of one fishing vessel or its gear coming into contact with another vessel or gear; or

(c) In which competition for a resource between one fishing vessel or its gear and another vessel or gear—

(1) Results in displacement of a traditional fishery by new gear,

(2) Results in reduced catches in the traditional fishery, or

(3) Leads the Councils to conclude that the situation will result in displacement of a traditional fishery by new gear or in reduced catches in the traditional fishery.

Competition is not in and of itself conflict; however, when competition is intensified, it can lead to conflict.

*Councils* means:

(a) The South Atlantic Fishery Management Council, Southpark Building, Suite 306, 1 Southpark Circle, Charleston, SC 29407-4699; and

(b) The Gulf of Mexico Fishery Management Council, 5401 W. Kennedy Boulevard, Suite 881, Tampa, FL 33609.

*EEZ*, as defined in § 620.2,

(a) For requirements related to king and Spanish mackerel, means the EEZ off the Atlantic coastal states south of the New York/Connecticut border and off the Gulf of Mexico coastal states;

(b) For requirements related to all other coastal migratory pelagic fish except bluefish, means the EEZ off the Atlantic coastal states south of the Virginia/North Carolina border and off the Gulf of Mexico coastal states; and

(c) For requirements related to bluefish, means the EEZ off the Gulf of Mexico coastal states.

*Overfished* means that the spawning stock biomass per recruit (SSBR) of a mackerel or cobia stock is less than the target level percentage recommended and approved in accordance with the stock assessment procedures. The target level percentage will be recommended by the assessment group and approved by the Scientific and Statistical Committees of the Councils, and may not be less than 20 percent.

*Overfishing* means—

(a) That an overfished stock is being harvested at a rate that is not consistent with a program that has been established to rebuild the stock to the target level percentage; or

(b) That a stock that is not overfished is being harvested at a rate that, if continued, would lead to a state of the stock that would not allow a harvest at least equal to optimum yield on a continuing basis.

4. In § 642.4, a new paragraph (a)(4) is added; and paragraphs (b)(1), (c), and (d) are revised to read as follows:

##### § 642.4 Permits and fees.

(a) \* \* \*

(4) For a corporation or partnership to be eligible for an annual vessel permit specified in paragraph (a)(1) of this section, the earned income qualification specified in paragraph (b)(2)(vi) of this section must be met by, and the statement required by that paragraph must be submitted by, a shareholder or officer of the corporation, a general partner of the partnership, or the vessel operator.

(b) \* \* \*

(1) An application for a permit may be submitted to the Regional Director at any time but should be submitted at least 60 days prior to the date on which the applicant desires to have the permit made effective. An application must be signed by the owner or operator.

(c) *Issuance.* The Regional Director will issue a permit at any time for an April through March permit year. Upon receipt of a complete application, a permit will normally be issued in 30 days but may take as long as 60 days during peak periods of activity (February and March). Until an annual vessel permit specified in paragraph (a)(1) of this section is on board, bag limits apply.

(d) *Fees.* A fee of \$23 will be charged for each permit issued under paragraph (a) of this section, beginning with permits issued for the permit year that commences April 1, 1991. The appropriate fee must accompany each permit application.

5. In § 642.5, a new paragraph (f) is added to read as follows:

##### § 642.5 Recordkeeping and reporting.

(f) For an owner or operator of a commercial, charter, or recreational vessel or a dealer or processor in the states from New York through Virginia, or in the waters off those states, for the purposes of paragraphs (c) and (e) of this section, the term "Science and Research Director" means the Science and Research Director, Northeast Fisheries Center, NMFS, Woods Hole,

MA 02543, telephone 508-548-5123, or a designee.

6. In § 642.7, in paragraph (i), the words "vessel identification" between the words "official" and "number" are removed; in paragraphs (k) and (m), the references to "§ 642.28(c)(2)" are revised to read "§ 642.28(a)(4)(ii)"; in paragraph (1), the reference to "§ 642.24 (c) or (d)" is revised to read "§ 642.24 (b)(1) or (c)"; paragraphs (p) and (s) are removed and reserved; paragraph (x) is removed; and paragraphs (b), (d), (e), (j), (n), (q), (t), and (u) are revised to read as follows:

#### § 642.7 Prohibitions.

(b) Possess in or harvest from the EEZ king or Spanish mackerel under the minimum size limit specified in § 642.23(a)(1), except for the catch allowance specified in § 642.23(a)(2).

(d) Fish in the EEZ for coastal migratory pelagic fish with prohibited gear or possess any coastal migratory pelagic fish in or from the EEZ aboard a vessel with prohibited gear aboard, as specified in § 642.24(a).

(e) Fish in the EEZ for king or Spanish mackerel with a gillnet with a mesh size less than the minimum allowable, or possess king or Spanish mackerel in or from the EEZ on board a vessel that has aboard a gillnet with a mesh size less than the minimum allowable, as specified in § 642.24(b).

(j) Purchase, barter, trade, or sell, for the remainder of the appropriate fishing year, king or Spanish mackerel harvested in the EEZ from a specific migratory group or zone after the commercial allocation or quota for that migratory group or zone in § 642.21 (a) or (c) has been reached and closure under § 642.22(a) has been invoked, as specified in § 642.28(a)(4)(iii). (This prohibition does not apply to trade in king or Spanish mackerel harvested, landed, and bartered, traded, or sold prior to the closure and held in cold storage by a dealer or processor.)

(n) Land, consume at sea, sell, or have in possession at sea or at time of landing king mackerel, Spanish mackerel, or cobia in excess of the bag limits specified in § 642.28 (a) and (b).

(q) Possess or land king mackerel, Spanish mackerel, or cobia without the head and fins intact, as specified in § 642.23(c).

(t) Operate a vessel in the EEZ with king mackerel, Spanish mackerel, or cobia aboard in excess of the

cumulative bag limit applicable to the vessel, as specified in § 642.28(d).

(u) Transfer king mackerel, Spanish mackerel, or cobia at sea, as specified in § 642.28(e).

7. Section 642.20 is revised to read as follows:

#### § 642.20 Seasons.

The fishing year for the Gulf migratory group of king mackerel for allocations and quotas begins on July 1 and ends on June 30. The fishing year for the Atlantic migratory groups of king and Spanish mackerel and the Gulf group of Spanish mackerel begins on April 1 and ends on March 31. The fishing year for all other coastal migratory pelagic fish begins on January 1 and ends on December 31.

8. In § 642.21, paragraphs (a)(3) and (c)(3) are revised to read as follows:

#### § 642.21 Allocations and quotas.

(a) \*\*\*

(3) A fish is counted against the commercial quota or allocation for the area where it is caught when it is first sold.

(c) \*\*\*

(3) A fish is counted against the commercial allocation for the area where it is caught when it is first sold.

9. Section 642.23 is revised to read as follows:

#### § 642.23 Size restrictions.

(a) *King and Spanish mackerel*—(1) *Minimum size.* The minimum size limit for the possession of king or Spanish mackerel in or taken from the EEZ is 12 inches (30.48 centimeters) fork length or 14 inches (35.56 centimeters) total length for both recreational and commercial fisheries, except for the incidental catch allowance under paragraph (a)(2) of this section.

(2) *Incidental catch allowance.* (i) A catch of king mackerel under the minimum size limit is allowed in the commercial fishery equal to five percent by weight of the total catch of king mackerel on board.

(ii) A catch of Spanish mackerel under the minimum size limit is allowed in the commercial fishery equal to five percent by weight of the total catch of Spanish mackerel on board.

(b) *Cobia.* The minimum size limit for the possession of cobia in or taken from the EEZ is 33 inches (83.82 centimeters) fork length or 37 inches (93.98 centimeters) total length for both recreational and commercial fisheries.

(c) *Head and fins intact.* A Spanish mackerel, king mackerel, or cobia

possessed in the EEZ must have its head and fins intact and a Spanish mackerel, king mackerel, or cobia taken from the EEZ must have its head and fins intact through landing. Such Spanish mackerel, king mackerel, or cobia may be eviscerated but must otherwise be maintained in a whole condition.

10. Section 642.24 is revised to read as follows:

#### § 642.24 Vessel, gear, equipment limitations.

(a) *Prohibited gear*—(1) *Drift gillnets.* The use of a drift gillnet to fish in the EEZ for coastal migratory pelagic fish is prohibited. A vessel in the EEZ or having fished in the EEZ with a drift gillnet aboard may not possess any coastal migratory pelagic fish.

(2) *Other Gear.* (i) Fishing gear is prohibited for use in the EEZ for migratory groups of king and Spanish mackerel as follows:

(A) King mackerel Gulf migratory group—all gear other than hook and line and run-around gillnets.

(B) Spanish mackerel Gulf and Atlantic migratory groups—purse seines.

(ii) Except for the purse seine incidental catch allowance specified in paragraph (c) of this section, a vessel in the EEZ in an area specified in § 642.29 for a migratory group or having fished in the EEZ in such area with prohibited gear aboard may not possess any of the species for which that gear is prohibited.

(b) *Gillnets.* (1) *King mackerel.* The minimum allowable mesh size for a gillnet used to fish in the EEZ for king mackerel is 4¾ inches (12.07 centimeters) (stretched mesh). A vessel in the EEZ or having fished in the EEZ with a gillnet aboard that has a mesh size less than 4¾ inches (12.07 centimeters) (stretched mesh) may possess an incidental catch of king mackerel that does not exceed 10 percent of the total lawfully possessed catch by number of Spanish mackerel on board.

(2) *Spanish mackerel.* The minimum allowable mesh size for a gillnet used to fish in the EEZ for Spanish mackerel is 3½ inches (8.89 centimeters) (stretched mesh). A vessel in the EEZ or having fished in the EEZ with a gillnet aboard that has a mesh size less than 3½ inches (8.89 centimeters) may not possess any Spanish mackerel.

(c) *Purse seine incidental catch allowance.* A vessel in the EEZ or having fished in the EEZ with a purse seine aboard will not be considered as fishing or having fished for king or Spanish mackerel in violation of a prohibition of purse seines under paragraph (a)(2) of this section, or, in the

case of king mackerel from the Atlantic migratory group, in violation of a closure effected in accordance with § 642.22(a), provided the catch of king mackerel does not exceed one percent or the catch of Spanish mackerel does not exceed 10 percent of the catch of all fish aboard the vessel. Incidental catch will be calculated by both number and weight of fish. Neither calculation may exceed the allowable percentage. Incidentally caught king or Spanish mackerel are counted toward the allocations and quotas provided for under § 642.21 (a) or (c) and are subject to the prohibition of sale under § 642.22(a).

11. In § 642.27, in paragraph (e), at the end of the first sentence the phrase, "prior to the appropriate fishing year" is removed; and paragraphs (a) and (c) are revised to read as follows:

**§ 642.27 Stock assessment procedures.**

(a) The Councils will appoint an assessment group (Group) that will assess the condition of each stock of king mackerel, Spanish mackerel, and cobia in the management unit on an annual basis. Such assessment will include determinations of overfished and overfishing. When a determination of overfishing is made for a stock, the group will develop and recommend appropriate ABC ranges for recovery periods consistent with a program to rebuild that stock. The Group will present a report of its assessment and recommendations to the Councils.

(c) If changes are needed in MSYs, TACs, allocations, quotas, bag limits, or permits, the Councils will advise the Regional Director in writing of their recommendations, accompanied by the assessment group's report, relevant background material, and public comment. Recommendations for the Atlantic groups of king and Spanish mackerel will be the responsibility of the South Atlantic Fishery Management Council, and recommendations for the Gulf groups of king and Spanish mackerel will be the responsibility of the Gulf of Mexico Fishery Management Council. The Councils' reports will be submitted each year by such date as may be specified by the Councils.

12. Section 642.28 is revised to read as follows:

**§ 642.28 Bag and possession limits.**

(a) *King and Spanish mackerel*—(1) *Bag limits.* A person who fishes for king or Spanish mackerel from the Gulf or Atlantic migratory group in the EEZ, except a person fishing under a permit

specified in § 642.4(a)(1) and an allocation specified in § 642.21 (a) or (c), or possessing the purse seine incidental catch allowance specified in § 642.24(d), is limited to the following:

(i) *King mackerel Gulf migratory group.* (A) Possessing three king mackerel per person per day, excluding the captain and crew, or possessing two king mackerel per person per day, including the captain and crew, whichever is the greater, when fishing from a charter vessel.

(B) Possessing two king mackerel per person per day when fishing from other vessels.

(ii) *King mackerel Atlantic migratory group.* (A) Possessing two king mackerel per person per day from the southern area.

(B) Possessing three king mackerel per person per day from the northern area.

(iii) *Spanish mackerel Gulf migratory group.* (A) Possessing four Spanish mackerel per person per day from the eastern area.

(B) Possessing ten Spanish mackerel per person per day from the western area.

(iv) *Spanish mackerel Atlantic migratory group.* (A) Possessing four Spanish mackerel per person per day from the southern area.

(B) Possessing ten Spanish mackerel per person per day from the northern area.

(2) *Multi-day possession limit.* A person subject to a bag limit specified in paragraph (a)(1) of this section may not possess in or from the EEZ during a single day, regardless of the number of trips or the duration of a trip, any king or Spanish mackerel in excess of such bag limit, except that a person who is on a trip that spans more than 24 hours may possess no more than two daily bag limits, provided such trip is aboard a charter vessel or headboat, and,

(i) The vessel has two licensed operators aboard as required by the U.S. Coast Guard for trips of over 12 hours, and

(ii) Each passenger is issued and has in possession a receipt issued on behalf of the vessel that verifies the length of the trip.

(3) *Areas.* (i) For the purposes of paragraphs (a)(1) (ii) and (iv) of this section, the boundary between the northern and southern areas is a line extending directly east from the Georgia/Florida boundary (30°42'45.6" N. latitude) to the outer limit of the EEZ.

(ii) For the purposes of paragraph (a)(1)(iii) of this section, the boundary between the eastern and western areas (identical to the eastern and western zones in the commercial fishery) is a line extending directly south from the

Alabama/Florida boundary (87°31'06" W. longitude) to the outer limit of the EEZ.

(4) *Fishing after a closure.* After a closure under § 642.22(a) is invoked for a commercial allocation or quota specified in § 642.21 (a) or (c), for the remainder of the fishing year specified in § 642.20:

(i) A vessel permitted under § 642.4(a)(1) to fish under a commercial allocation for mackerel may not fish under a bag limit specified in paragraph (a)(1) of this section for the closed species/migratory group/zone, except as provided for under paragraph (a)(4)(ii) of this section.

(ii) A charter vessel permitted to fish under a commercial allocation for mackerel may continue to harvest fish under a bag and possession limit specified in paragraphs (a) (1) and (2) of this section provided it is under charter and the recreational allocation for the respective migratory group of mackerel under § 642.21 (b) or (d) has not been reduced to zero under § 642.22(b).

(iii) The purchase, barter, trade, or sale of king or Spanish mackerel taken in the EEZ from the closed area is prohibited.

(b) *Cobia.* The daily bag and possession limit for cobia in or from the EEZ of the Gulf of Mexico and the Atlantic Ocean south of the Virginia/North Carolina border is two fish per person, without regard to whether or not the cobia are taken aboard a vessel with a commercial permit.

(c) *Combination of bag limits.* A person who fishes in the EEZ may not combine a bag or possession limit of this part with any bag or possession limit applicable to state waters.

(d) *Responsibility for bag and possession limits.* The operator of a vessel that fishes in the EEZ is responsible for the cumulative bag limit, based on the number of persons aboard, applicable to that vessel.

(e) *Transfer of fish.* A person for whom a bag or possession limit specified in this section applies may not transfer at sea king mackerel, Spanish mackerel, or cobia—

(1) Taken in the EEZ; or

(2) In the EEZ, regardless of where such king mackerel, Spanish mackerel, or cobia was taken.

13. In addition to the amendments set forth above,

**§ 642.2 [Amended].**

a. In § 642.2 the phrase "gill net" is revised to read "gillnet" where it appears in the term *Drift gillnet* and its definition (a total of four places); in the term *Gillnet*; and in the term *Runaround*

*gillnet* and its definition (a total of two places); and

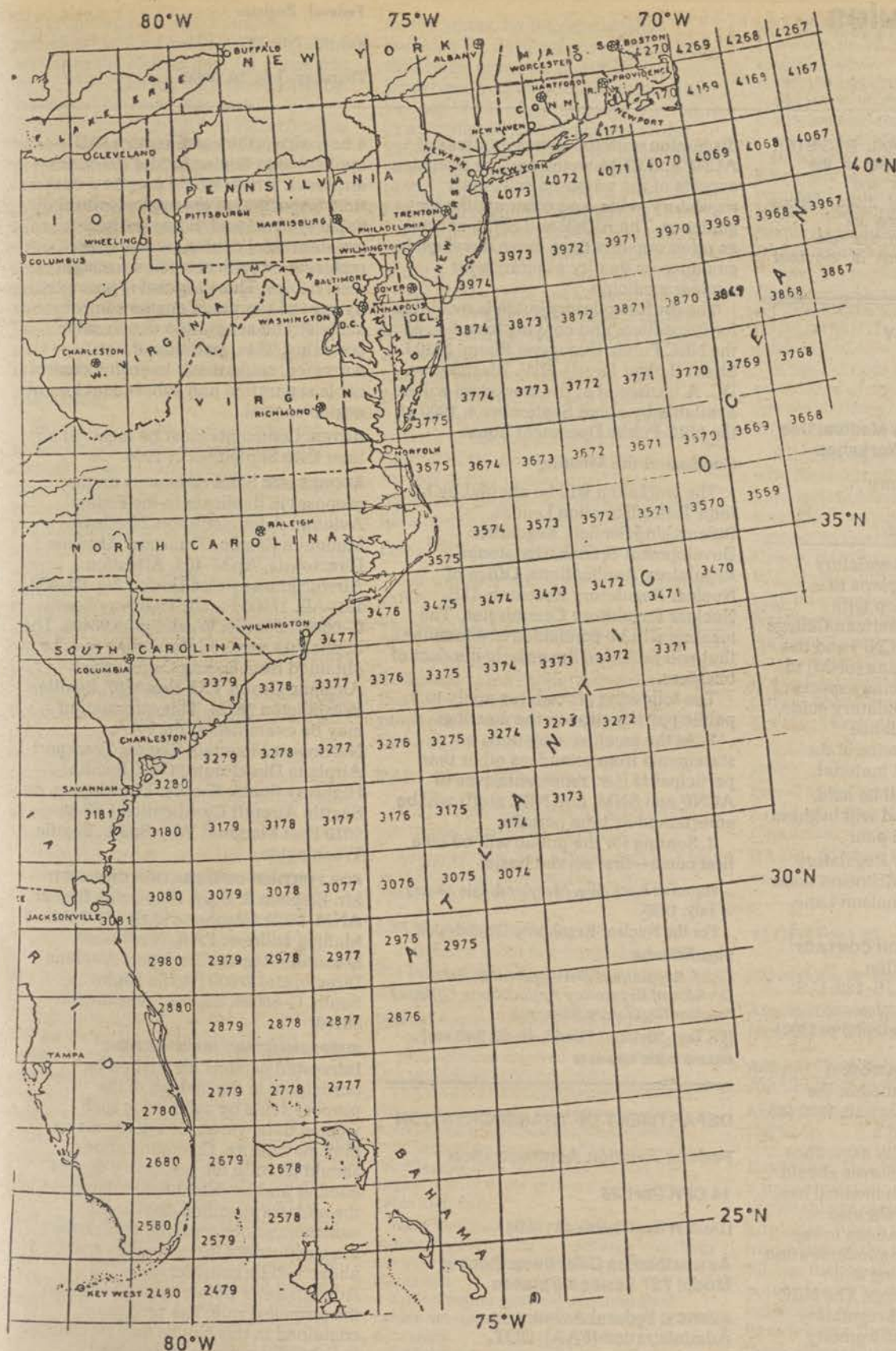
**§ 642.26 [Amended].**

b. In § 642.26 the phrase "gill nets" is revised to read "gillnets" where it appears in paragraph (a)(1)(iii).

**Appendix A—[Amended]**

14. In Appendix A to part 642, that part of Figure 3 showing Statistical Grids for the South Atlantic is revised to read as follows:

BILLING CODE 3510-22-M



# Proposed Rules

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 35

#### Quality Assurance in the Medical Use of Byproduct Material; Workshop

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) staff plans to convene a public workshop with representatives of the American College of Nuclear Physicians (ACNP) and the Society of Nuclear Medicine (SNM) to discuss the nuclear medicine aspects of a proposed rule, draft regulatory guide, and other applicable guidance concerning quality assurance in the medical use of byproduct material.

**DATES:** The workshop will be held Monday, July 23, 1990, and will begin at 9:30 a.m. and end about 5 p.m.

**ADDRESSES:** U.S. Nuclear Regulatory Commission, room 013, Nicholson Lane Building/South, 5650 Nicholson Lane, Rockville, Maryland.

**FOR FURTHER INFORMATION CONTACT:** Mr. John Telford, Regulation Development Branch, NL/S-129, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-3796.

**SUPPLEMENTARY INFORMATION:** A proposed rule was published in the Federal Register on January 16, 1990 [55 FR 1439] which described a performance-based quality assurance program that the NRC believes should be incorporated into each medical use program. The proposed rule also contains certain modifications to the definition of the term misadministration and to the related reporting and recordkeeping requirements. The NRC has also prepared a draft regulatory guide that contains specific quality assurance procedures to meet the performance-based rule.

The purpose of the workshop is to obtain input from and have a roundtable

discussion with the representatives of ACNP and SNM on the nuclear medicine aspects of the proposed rule, draft regulatory guide, and other applicable guidance. The ACNP and SNM, as well as other organizations, have developed guidance on quality assurance for nuclear medicine.

The draft regulatory guide is available for inspection, and copying for a fee, at the NRC Public Document Room, 2120 L Street (Lower Level), NW, Washington, DC. A transcript of the workshop will be available by about September 4, 1990 at the NRC Public Document Room.

#### Conduct of the Meeting

The workshop will be chaired by Mr. John Telford, Section Leader, Rulemaking Section, Regulation Development Branch, Division of Regulatory Applications, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission. The meeting will be conducted in a manner that will facilitate the orderly conduct of business.

The following procedures apply to public participation in the meeting:

1. At the meeting, questions or statements from attendees other than participants (i.e., representatives of ACNP and SNM, and NRC staff) will be entertained as time permits.
2. Seating for the public will be on a first come—first served basis.

Dated at Rockville, Maryland, this 13 day of July, 1990.

For the Nuclear Regulatory Commission,  
**Sher Bahadur,**  
*Chief, Regulations Development Branch,  
 Division of Regulatory Applications, Office of  
 Nuclear Regulatory Research.*

[FR Doc. 90-16907 Filed 7-18-90; 8:45 am]

BILLING CODE 7590-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 90-NM-131-AD]

#### Airworthiness Directives: Boeing Model 737 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt

a new airworthiness directive (AD), applicable to Boeing Model 737 series airplanes, which would require a one-time inspection of the engine control cable systems and, if non-corrosion resistant steel cables are installed, replacement with corrosion resistant steel cables. This proposal is prompted by several reports of engine control cable strand separation due to cable corrosion. This condition, if not corrected, could result in engine control cable separation and subsequent loss of engine control.

**DATES:** Comments must be received no later than September 7, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-131-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stephen S. Bray, Propulsion Branch, ANM-140S; telephone (206) 431-1969. Mailing address: FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comment received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of

the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 90-NM-131-AD." The post card will be date/time stamped and returned to the commenter.

#### Discussion

Several operators of Boeing Model 737 series airplanes have reported engine control cable separation after approximately 4,000 flight hours. These reports prompted Boeing to conduct an engine control cable wear survey. A significant number of the engine control cables revealed evidence of cable corrosion or wear beyond acceptable limits. Failure to detect and replace damaged cables could result in engine control cable separation and subsequent loss of engine control.

The FAA has reviewed and approved Boeing Service Letter 737-SL-76-2-A, dated August 25, 1977, which recommends the replacement of non-corrosion resistant carbon steel cables with corrosion resistant steel cables in accordance with the Model 737 Maintenance Manual.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require a one-time inspection of the engine control cables and, if non-corrosion resistant cables are installed, replacement with corrosion resistant cables.

There are approximately 1,750 Model 737 series airplanes of the affected design in the worldwide fleet. It is estimated that 850 airplanes of U.S. registry would be affected by this AD, that it would take approximately 40 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Replacement cables are estimated to cost on the average of \$800 per airplane. (A survey of major U.S. Model 737 operators indicates that only about 25% of the cables currently installed would need to be replaced.) Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$2,040,000.

The regulations proposed herein would not have substantial direct effects

on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 737 series airplanes, certificated in any category.

Compliance required as indicated, unless previously accomplished.

To prevent loss of engine control due to engine control cable separation resulting from corrosion, accomplish the following:

A. Within the next 3,000 flight hours after the effective date of this AD, inspect the engine control cable system for the type of cable installed.

Note: Determination of cable(s) part number by review by maintenance records is considered acceptable in lieu of actual inspection.

1. If corrosion resistant stainless steel cables are installed, no further action is necessary.

2. If non-corrosion resistant cable steel cables are installed, prior to further flight, replace cables in accordance with the appropriate Boeing Model 737 Maintenance

Manual section (reference Boeing Service Letter 737-SL-76-2-A, dated August 25, 1977) specified below:

- a. 737-100 and -200 Maintenance Manual section 76-11-21.
- b. 737-300 and -400 Maintenance Manual section 76-11-04.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note: The request should be submitted directly to the Manager, Seattle ACO, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Seattle ACO.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 9, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-16881 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 90-NM-119-AD]

#### Airworthiness Directives; Boeing Model 737 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to certain Model 737 series airplanes, which would require an inspection of the crew oxygen system tubing, the auxiliary power unit (APU) power feeder wire bundle, and the horizontal stabilizer trim control cables to determine the clearance between them. If insufficient clearance exists, repair or replacement of the oxygen tubing is necessary. This proposal is prompted by a report that certain

airplanes may have been delivered with insufficient clearances between these components in the area below the control cabin floor. This condition, if not corrected, could result in an oxygen fed fire due to chafing and subsequent electrical arcing between the power feeder bundle and the crew oxygen tube.

**DATES:** Comments must be received no later than September 7, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-119-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan Letcher, Systems and Equipment Branch, ANM-130S; telephone (206) 431-1947. Mailing address: FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice

must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 90-NM-119-AD." The post card will be date/time stamped and returned to the commenter.

#### Discussion

The manufacturer has reported that certain Model 737 series airplanes may have been delivered with insufficient clearances between the crew system oxygen tubes, the Auxiliary Power Unit (APU) power feeder wire bundle, and the horizontal stabilizer trim control cables. This problem was corrected later in production, but airplanes manufactured before Line Number 1760 may have components with insufficient clearances. Insufficient clearance may result in chafing of wire bundles on the oxygen tubes, which could lead to ignition of leaking oxygen due to electrical arcing from the damaged wires.

The FAA has reviewed and approved Boeing Service Bulletin 737-35-1033, dated March 15, 1990, which describes procedures for inspection of the clearance between the crew system oxygen tubes, APU power feeder wire bundle, and horizontal stabilizer trim control cables in the affected area; repair of damaged components; and installation of new oxygen tubing if clearances are insufficient. The service bulletin also allows for installation of spacers instead of new tubing to obtain clearance if separation is inadequate between the oxygen tube and wire bundle only, and if no damage has occurred in the area.

Since this condition is likely to exist on other airplanes of this same type design, an AD is proposed which would require a one-time inspection and, if necessary, repair and modification in accordance with the service bulletin described above.

There are approximately 603 Model 737 series airplanes of the affected design in the worldwide fleet. It is estimated that 334 airplanes of U.S. registry would be affected by this AD, that it would take approximately 8 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$106,880.

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order

12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

**Boeing: Applies to Model 737 series airplanes, listed in Boeing Service Bulletin 737-35-1033, dated March 15, 1990, certificated in any category. Compliance required within 3,000 hours time-in-service after the effective date of this AD, unless previously accomplished.**

To prevent fire caused by the chafing of wire bundles on crew oxygen tubing, accomplish the following:

A. Inspect the clearances between the crew oxygen tubing, the auxiliary power unit (APU) power feeder wire bundle, and the horizontal stabilizer trim control cables, located below the control cabin floor, in accordance with Boeing Service Bulletin 737-35-1033, dated March 15, 1990.

1. If there is inadequate clearance or damage has occurred, prior to further flight, repair damage, replace the oxygen tubing with modified tubing, and perform a leak check, in accordance with the Service Bulletin.

2. If clearance is inadequate between the crew oxygen tubing and the wire bundle only, and no damage has occurred, floating loop clamps and spacers may be installed to obtain sufficient clearance between the

tubing and wire bundle, in accordance with the Service Bulletin.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note: The request should be submitted directly to the Manager, Seattle ACO, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Seattle ACO.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 9, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-16882 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 90-NM-134-AD]

#### Airworthiness Directives; Boeing Model 737-300 and 737-400 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes to supersede an existing airworthiness directive (AD), applicable to all Boeing Model 737-400 series airplanes, which currently requires modification of the auxiliary power unit (APU) instrumentation wiring. That action was prompted by reports that the APU exhaust gas temperature (EGT) indication incorrectly read "zero" following an APU shutdown, including an APU shutdown associated with an aborted APU start. This condition, if not corrected, could result in undetected overtemperature damage to the APU rotor structure, which could then result in rotor failure and possible structural damage to the airplane. This action

would require the same APU modification on certain Boeing 737-300 airplanes, since these airplanes may exhibit the same APU operational deficiency.

**DATES:** Comments must be received no later than September 7, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-134-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stephen Bray, Propulsion Branch, ANM-140S; telephone (206) 431-1969. Mailing address: FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to

Docket Number 90-NM-134-AD." The post card will be date/time stamped and returned to the commenter.

#### Discussion

On April 13, 1990, the FAA issued AD 90-09-05, Amendment 39-6583 (55 FR 15220, April 23, 1990) to require modification of the auxiliary power unit (APU) instrumentation wiring on all Boeing Model 737-400 series airplanes. That action was prompted by a manufacturer's production flight test report on a Model 737-400 airplane, in which an operational deficiency was detected in the APU exhaust gas temperature (EGT) indication system: the APU EGT gauge may incorrectly read "zero" immediately following a normal APU shutdown or a shutdown associated with an aborted start. This operational deficiency does not allow the flightcrew to monitor the APU EGT following an APU shutdown. Monitoring the APU EGT following APU shutdown is part of the flightcrew's recommended procedure in such situations. This condition, if not corrected, could result in undetected damage to the APU rotor structure, and subsequently cause rotor failure and possible structural damage to the airplane.

Since the issuance of AD 90-09-05, the FAA has reviewed additional information from the airplane manufacturer which indicates that this same unsafe condition may also exist on certain Boeing Model 737-300 series airplanes, whose APU EGT instrumentation design is similar to that of the Model 737-400.

The FAA has reviewed and approved Boeing Service Bulletin 737-49-1071, dated May 10, 1990, which describes a modification of the APU EGT wiring that precludes the operational deficiency. This electrical modification adds a hard wired power source to assure continuous APU EGT indication to the flight compartment following all APU shutdowns.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would supersede AD 90-09-05 with a new AD that would require modification of the APU EGT instrumentation on Model 737-300 and 737-400 series airplanes, in accordance with the service bulletin described above.

There are approximately 823 Model 737-300 and 737-400 series airplanes of the affected design in the worldwide fleet. It is estimated that 380 airplanes of U.S. registry would be affected by this AD, that it would take approximately 9 manhours per airplane to accomplish the

required actions, and that the average labor cost would be \$40 per manhour. The cost of modification parts is considered negligible. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$136,800.

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR Part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by superseding Amendment 39-6583 (55 FR 15220, April 23, 1990), AD 90-09-05, with the following new airworthiness directive:

Boeing: Applies to Model 737-300 and 737-400 series airplanes, listed in Boeing Service Bulletin 737-49-1071, dated May 10, 1990, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent auxiliary power unit (APU) rotor failure resulting from an

undetected EGT overtemperature condition, accomplish the following:

A. For Model 737-400 series airplanes: Within 1,000 hours time-in-service after May 29, 1990 (the effective date of Amendment 39-6583, AD 90-09-05), modify the APU instrumentation wiring in a manner that will assure continuous flight-compartment APU exhaust gas temperature (EGT) indication following a shutdown. The modification must be accomplished in a manner approved by the Manager, Seattle Aircraft Certification Office, FAA, Transport Airplane Directorate; or in accordance with Boeing Service Bulletin 737-49-1071, dated May 10, 1990.

B. For Model 737-300 series airplanes: Within 1,000 hours time-in-service after the effective date of this amendment, modify the APU instrumentation wiring in accordance with Boeing Service Bulletin 737-49-1071, dated May 10, 1990.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note: The request should be submitted directly to the Manager, Seattle ACO, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Seattle ACO.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 9, 1990.

Darrell M. Pederson,  
Acting Manager, Transport Airplane  
Directorate, Aircraft Certification Service.  
[FR Doc. 90-16883 Filed 7-18-90; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 89-NM-261-AD]

#### Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt a new airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, which would require inspection of the center wing fuel tank secondary fuel barrier application, and repair, if necessary. This proposal is prompted by reports of the secondary fuel barrier not being applied correctly. This condition, if not corrected, could result in fuel or fuel vapors entering the cargo and passenger compartments in the event of failure of a primary seal or a crack in the center wing box structure.

**DATES:** Comments must be received no later than September 11, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-261-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Dostert, Propulsion Branch, ANM-140S, telephone (206) 431-1974. Mailing address: FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report

summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-261-AD." The post card will be date/time stamped and returned to the commenter.

#### Discussion

On May 15, 1990, the FAA issued AD 90-11-08, Amendment 39-6609 (55 FR 21377, May 24, 1990), applicable to certain Boeing Model 747-200 and 747-300 series airplanes, which requires a one-time visual inspection of the center wing box secondary fuel barrier in conjunction with modification of the drag splice fitting. That rule provides terminating action for AD 88-11-11, Amendment 39-5939 (53 FR 18834, May 25, 1988), which required repetitive inspections for fuel leakage from the center wing fuel tank front spar into the forward cargo compartment. Those regulatory actions were prompted by reports of fuel leakage into the forward cargo compartment from the drag splice fitting, and the determination that the secondary fuel barrier on the center wing fuel tank front spar and upper surface may not have been properly applied. AD 90-11-08 is applicable to all Model 747-200 and 747-300 series airplanes, line number 199 through 720, on which the drag splice fitting had been incorporated in production, and to certain Model 747-200 series airplanes, line number 88 through 198, on which the drag splice fitting has been installed in accordance with Boeing Service Bulletin 747-53-2064.

The secondary fuel barrier is applied by spraying the sealant on the wing center section upper surface and/or front spar. An inspection of a Model 747-200 series airplane in production revealed that the back side of fasteners and brackets may not have been coated as these areas were shielded from spray. This coating is required to prevent fuel or fuel vapors from entering the cargo and passenger compartments in the event of a failure of a primary fuel seal or a crack in the center section structure. The spray-on process by which the secondary fuel barrier was applied on Model 747 airplanes through line number 776 is identical to that used on the Model 747-200 airplane found to have the secondary coating misapplied. Therefore, it has been determined that all Boeing Model 747 airplanes through line number 776 require inspection of the

secondary fuel barrier to verify that the coating was properly applied during production.

The previously issued rulemaking activity noted above requires inspection of the secondary fuel barrier on Model 747 airplanes concurrent with modification of the drag splice fitting. This new action would require inspection of the coating on Model 747 airplanes not included in that activity.

The FAA has reviewed and approved Boeing Service Bulletin 747-57-2253, Revision 1, dated July 5, 1990, which describes procedures for inspection of the center wing fuel tank secondary fuel barrier application, and repair, if necessary.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require inspection of the center wing fuel tank secondary fuel barrier application, and repair, if necessary, in accordance with the service bulletin previously described.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB Control Number 2120-0056.

There are approximately 283 Model 747 series airplanes of the affected design in the worldwide fleet. It is estimated that 112 airplanes of U.S. registry would be affected by this AD, that it would take approximately 136 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$609,280.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised) Pub. L. 97-449, January 12, 1983; and 14 CFR 11.89.

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 747 series airplanes, as listed in Boeing Service Bulletin 747-53-2253, Revision 1, dated July 5, 1990, certified in any category. Compliance required as indicated, unless previously accomplished.

To verify proper application of the center wing fuel tank secondary fuel barrier and prevent fuel or fuel vapors from entering the cargo or passenger compartments, accomplish the following:

A. Within the next 30 months after the effective date of this AD, inspect the center wing fuel tank secondary fuel barrier application, in accordance with Boeing Service Bulletin 747-53-2253, Revision 1, dated July 5, 1990. If the barrier has been improperly applied, as specified in the service bulletin, repair prior to further flight, in accordance with the service bulletin.

B. Within 30 days after accomplishing the inspection required by paragraph A., above, submit a report of the complete findings of inspections from which it is determined that the secondary fuel barrier is not properly applied, to: Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68968, Seattle, Washington 98168; rapid fax: (206) 431-1913; telex 756366.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note: The request should be submitted directly to the Manager, Seattle ACO, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Seattle ACO.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the

manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 12, 1990.

Leroy A. Keith,  
Manager, Transport Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. 90-16887 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

## 14 CFR Part 39

[Docket No. 90-NM-105-AD]

### Airworthiness Directives: Boeing Model 767 Series Airplanes Equipped With Pratt and Whitney JT9D-7R4 Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt a new airworthiness directive (AD), applicable to certain Boeing Model 767 series airplanes, which would require replacement of three existing drain tubes and a tee fitting in order to reroute the tee fitting away from the number 3 bearing oil pressure line. This proposal is prompted by reports of oil leaks in the number 3 bearing oil pressure line due to chafing by the adjacent tee fitting from the drain system. This condition, if not corrected, could result in possible engine fires and potential inflight shutdowns due to oil loss.

**DATES:** Comments must be received no later than September 10, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-105-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport

Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Lanny C. Pinkstaff, Propulsion Branch, ANM-140S; telephone (206) 431-1514. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

#### SUPPLEMENTARY INFORMATION:

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comment to Docket Number 90-NM-105-AD." The post card will be date/time stamped and returned to the commenter.

#### Discussion

The FAA has received reports of oil leaks in the number 3 bearing oil pressure line on Boeing Model 767 series airplanes powered by Pratt and Whitney JT9D-7R4 engines due to chafing by the adjacent tee fitting from the drain system. This condition, if not corrected, could result in possible engine fires and potential engine inflight shutdowns due to oil loss.

The FAA has reviewed and approved Boeing Alert Service Bulletin 767-71A0057, dated February 22, 1990, which describes a modification to the drain

system which reroutes the drain lines and tee fitting away from the number 3 bearing oil pressure line to eliminate the chafing from the tee fitting. This modification includes replacement of three drain tubes and a tee fitting on the right side of each engine, with three new drain tubes and a new tee fitting.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require modification of the drain system in accordance with the service bulletin previously described.

There are approximately 92 Model 767 series airplanes of the affected design in the worldwide fleet. It is estimated that 31 airplanes of U.S. registry would be affected by this AD, that it would take approximately 8 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Modification parts are available from the manufacturer at a cost of \$1,072 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$43,152.

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

**PART 39—[AMENDED]**

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

**§ 39.13 [Amended]**

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 767 series airplanes, equipped with Pratt and Whitney JT9D-7R4 engines, as listed in Boeing Alert Service Bulletin 767-71A0057, dated February 22, 1990, certificated in any category. Compliance is required within 9 months after the effective date of this AD, unless previously accomplished.

To prevent possible engine fires and potential inflight engine shutdowns due to oil loss, accomplish the following:

A. Modify the drain system on each engine in accordance with Boeing Alert Service Bulletin 767-71A0057, dated February 22, 1990.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Note: The request should be submitted directly to the Manager, Seattle ACO, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Seattle ACO.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 10, 1990.

Darrell M. Pederson,  
Acting Manager, Transport Airplane  
Directorate, Aircraft Certification Service.

[FR Doc. 90-16885 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

**14 CFR Part 39**

[Docket No. 90-NM-129-AD]

**Airworthiness Directives; Boeing of Canada, Ltd., de Havilland Division, Model DHC-8 Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt a new airworthiness directive (AD), applicable to certain de Havilland Model DHC-8 series airplanes, which would require inspections of the flap primary-drive torque tube system to detect cracks, operational checks of the torque sensor to detect malfunctions, and replacement with serviceable parts, if necessary. This proposal is prompted by reports of flap torque-tube failure at the splined coupling due to improper heat treatment in early serial number parts, and a malfunctioning torque sensor in the secondary-drive system. This condition, if not corrected, could result in the flaps failing to deploy symmetrically, causing a reduction in roll control effectiveness.

**DATES:** Comments must be received no later than September 7, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-129-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

**FOR FURTHER INFORMATION CONTACT:** Mr. C. Kallis, System and Equipment Branch, ANE-173; telephone (516) 791-6427. Mailing address: FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in the making of the proposed rule by submitting such

written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 90-NM-129-AD." The post card will be date/time stamped and returned to the commenter.

**Discussion**

Transport Canada, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on certain de Havilland DHC-8 series airplanes. There have been recent reports of failure of the flap primary-drive torque-tube at the spline couplings due to improper heat treatment in early serial number parts, and also a report of a malfunctioning torque sensor in the secondary-drive system. This condition, if not corrected, could result in the flaps failing to deploy symmetrically, causing a reduction in roll control effectiveness.

Sundstrand Corporation, the manufacturer of the torque tube assembly, has issued Alert Service Bulletins 734187-27-A2, 734378-27-A3, 734380-27-A2, 734382-27-A3, 734384-27-A2, 734386-27-A2, and 734388-27-A1, all dated October 20, 1989, which provide instructions for replacing splined couplings with couplings that are heat-treated to a lower hardness rating in the required areas for certain part number and serial number couplings. Transport Canada has classified these service bulletins as mandatory, and has issued Airworthiness Directive CF-89-09R1 addressing this subject.

This airplane model is manufactured in Canada and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require (1) an inspection of the flap primary-drive torque tubes to determine part numbers and specified serial numbers, a visual inspection to detect cracks around bolt holes in splined couplings, and replacement of splined couplings or replacement of the particular torque tube assembly with a serviceable assembly, if necessary; (2) eventual replacement of all splined couplings on certain torque tubes with properly heat-treated couplings; and (3) repetitive visual inspections of the flap primary-drive torque tube system and the flap secondary-drive flex shaft system, and replacement with serviceable parts, if necessary; in accordance with the service bulletins previously described. This action would also require repetitive operational checks of the torque sensor, and replacement with a serviceable part, if necessary, in accordance with Maintenance Program Task 2750/11.

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

It is estimated that 60 airplanes of U.S. registry would be affected by this AD, that it would take approximately 12 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$28,800.

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291, (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the

criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [AMENDED]

2. Section 39.13 is amended by adding the following new airworthiness directive:

#### Boeing of Canada, Ltd., De Havilland

Division: Applies to de Havilland Model DHC-8 series airplanes, certificated in any category. Compliance is required as indicated, unless previously accomplished.

To prevent asymmetric flap deployment, accomplish the following:

A. For airplanes Serial Numbers 3 through 177: Within 300 flight hours after the effective date of this AD, accomplish the following:

1. Locate and inspect the flap primary-drive torque tubes to determine if parts having part numbers and serial numbers listed in TABLE 1, below, are installed.

TABLE 1

Torque tube P/N series	Torque tube S/N
734187.....	125 through 139.
734378.....	129 through 150.
734380.....	127 through 138.
734382.....	211 through 258.
734384.....	153 through 180.
734386.....	195 through 230.
734388.....	160 through 169.

2. If any torque tube listed in TABLE 1 is installed, prior to further flight, remove the through-bolt from the splined coupling on each end of the torque tube and, using a 10X magnifying glass, visually inspect the area around the bolt holes for cracks.

3. If a splined coupling is found to be cracked on a particular torque tube, prior to further flight, accomplish either subparagraph a. or b., below:

a. Replace the splined couplings on that torque tube in accordance with the accomplishment instructions in the appropriate Sundstrand Service Bulletin specified in TABLE 2, below, and re-identify the torque tube as indicated. Marking the

service bulletin number on the rod with indelible ink will satisfy this requirement; or  
b. Replace the particular torque tube with a serviceable unit.

Note: Some torque tubes have one splined coupling while others have two.

TABLE 2

Torque tube P/N series	Sundstrand service bulletin No.	Post-modification identification
734187.....	734187-27-A2....	27-A2.
734378.....	734378-27-A3....	27-A3.
734380.....	734380-27-A2....	27-A2.
734382.....	734382-27-A3....	27-A3.
734384.....	734384-27-A2....	27-A2.
734386.....	734386-27-A2....	27-A2.
734388.....	734388-27-A1....	27-A1.

4. Upon reassembly, install the through-bolt, and torque to between 20 and 25 in-lb.

B. For airplanes, Serial Numbers 3 through 177: Within 900 flight hours after the effective date of this AD, replace all splined couplings on torque tubes identified in TABLE 1, above, in accordance with the accomplishment instructions in the appropriate Sundstrand Service Bulletin specified in TABLE 2, above. Re-identify the torque tubes as indicated. Marking the service bulletin number on the rod with indelible ink will satisfy this requirement.

C. For airplanes, Serial Numbers 3 and subsequent: Within 300 flight hours after the effective date of this AD, and thereafter at intervals not to exceed 300 flight hours, accomplish the following visual inspection of the flap primary-drive torque tube system and the flap secondary-drive flex shaft system:

1. Extend flaps fully.  
2. Visually inspect the flap primary-drive torque tubes over their entire length for fracture, rubbing, and wear.  
3. Damaged torque tubes, or torque tubes exhibiting wear greater than 0.010 inch in depth or 180 degrees around the circumference, must be replaced with serviceable torque tubes prior to further flight.  
4. Visually inspect the flap secondary-drive flex shaft for permanent deformation (kinks), or evidence of excessive heat (bluing of outer braided sheath, melting of outer plastic sheath, loss of blue anodic film on the casing ferrules).

5. Damaged flex shafts must be replaced with serviceable flex shafts prior to further flight.

D. For airplanes, Serial Numbers 3 and subsequent: Within 600 flight hours after the effective date of this AD, unless previously accomplished within the last 600 flight hours, and thereafter at intervals not to exceed 1,200 flight hours, accomplish the following:

1. Perform an operational check of the torque sensor in accordance with Maintenance Program Task 2750/11. (Refer to DASH 8 Maintenance Program Supplementary Information, PSM 1-8-7/1-83-7, Volume 2, Procedures-27, page 15, dated 15 July 1988.)

2. Any torque sensor found malfunctioning or jammed must be replaced with a serviceable unit prior to further flight.

E. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, New York Aircraft Certification Office, ANE-173, FAA, New England Region.

Note: The request should be submitted directly to the Manager, New York Aircraft Certification Office, ANE-173, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the New York Aircraft Certification Office, ANE-173.

F. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

Issued in Seattle, Washington, on July 9, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.  
[FR Doc. 90-16884 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 90-NM-136-AD]

#### Airworthiness Directives; British Aerospace Model BAe 125-800A Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt a new airworthiness directive (AD), applicable to all British Aerospace Model BAe 125-800A series airplanes, which would require a lubrication inspection of the MLG upper and lower torque link pivots; visual and dye penetrant inspections to detect cracks or defects of the pivot pins and bolts; and repair or replacement, as necessary; and repetitive lubrication procedures thereafter. This proposal is prompted by reports of two instances in which a MLG torque link pin fractured due to overload

induced by excessive stiffness in the torque link pivots. This condition, if not corrected, could result in failure of a link pin, and subsequent reduced structural integrity of the MLG.

**DATES:** Comments must be received no later than September 7, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-136-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from British Aerospace, PLC, Librarian for Service Bulletins, P.O. Box 17414, Dulles International Airport, Washington, DC 20041-0414. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Schroeder, Standardization Branch, ANM-113; telephone (206) 431-1565. Mailing address: FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

#### SUPPLEMENTARY INFORMATION:

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following

statement is made: "Comments to Docket Number 90-NM-136-AD." The post card will be date/time stamped and returned to the commenter.

#### Discussion

The United Kingdom Civil Aviation Authority, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on all British Aerospace Model BAe 125-800A series airplanes. There have been two reports that a main landing gear (MLG) torque link pin fractured due to overload induced by excessive stiffness in the torque link pivots. This condition, if not corrected, could result in failure of a link pin, and subsequent reduced structural integrity of the MLG.

British Aerospace has issued Service Bulletin 32-222, dated November 10, 1989, which describes procedures for (1) a one-time lubrication and visual lubrication inspection to determine if grease appears at locations defined in the service bulletin; and, if it does not, (2) a one-time disassembly, checking of pivot clearances, visual and dye penetrant inspections to detect defects and cracks in all pivot pins and bolts, and repair or replacement, if necessary; hand lubrication and reassembly; and (3) repetitive disassembly and hand lubrication of the upper and lower torque links on those airplanes that grease does not appear at locations defined in the service bulletin. The United Kingdom CAA has classified this service bulletin as mandatory.

British Aerospace has also issued Service Bulletin 32-222-3244A, Revision 1, dated March 5, 1990, which describes procedures for installation of new improved torque link pivot arrangements (Modification 253244A), which, if incorporated, terminates the need for the repetitive disassembly and hand lubrication procedures. The United Kingdom has not classified this service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and type certificated in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require a lubrication inspection of the MLG upper and lower torque link pivots; visual and dye penetrant inspections to detect cracks or defects of the pivot pins and bolts; repair or replacement, as necessary; and

repetitive lubrication procedures thereafter, in accordance with Service Bulletin 32-222 described above. Installation of a new improved torque link pivot assembly (Modification 253244A), in accordance with Service Bulletin 32-222-3244A, described above, is provided as an optional terminating action for the repetitive lubrication procedures.

It is estimated that 119 airplanes of U.S. registry would be affected by this AD, that it would take approximately 1 manhour per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$4,760.

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

**British Aerospace:** Applies to all Model BAe 125-800A series airplanes, on which British Aerospace Modification 253244A has not been incorporated, certificated in any category. Compliance is required as indicated, unless previously accomplished.

To prevent failure of a link pin and subsequent reduced structural integrity of the main landing gear (MLG), accomplish the following:

A. Within 30 days after the effective date of this AD, with the airplane on wheels, lubricate the right and left MLG upper and lower torque link pivots (three per landing gear), in accordance with British Aerospace Service Bulletin 32-222, dated November 10, 1989.

1. If grease *does appear* in all places indicated in the service bulletin no further action in accordance with this AD is required and the airplane may be returned to service.

2. If grease *does not appear* in all places indicated in the service bulletin, prior to further flight, disassemble that main landing gear, perform visual and dye penetrant inspections to detect defects (scoring, wear, necking, ovality, and/or blocked grease holes) and cracks in the pivot pins and bolts, and hand lubricate the torque link pivots, in accordance with the service bulletin.

a. If the condition of the torque link pin or bolt reveals defects or cracks, prior to further flight, replace it with a serviceable part in accordance with the service bulletin.

b. If the clearance between any torque link and the MLG is less than 0.002 inch, carefully abrade the surfaces of the bushes in the torque link to achieve the required .002 inch minimum/.010 inch maximum condition, in accordance with the service bulletin.

c. At intervals not to exceed 50 landings, disassemble and repeat the special hand lubrication of the MLG upper and lower torque links, in accordance with the service bulletin.

B. Incorporation of Modification 253244A, in accordance with British Aerospace Service Bulletin 32-222-3244A, Revision 1, dated March 5, 1990, constitutes terminating action for the repetitive lubrication procedures required by paragraph A.2.c., above.

C. An alternate means of compliance or adjustment of the compliance time, which provide an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate.

Note: The request should be submitted directly to the Manager, Standardization Branch, ANM-113, and a copy sent to the cognizant FAA Principal Inspector (PI). The PI will then forward comments or concurrence to the Standardization Branch, ANM-113.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to British Aerospace, PLC, Librarian for Service Bulletins, P.O. Box

17414, Dulles International Airport, Washington, DC 20041-0414. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 9, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-16898 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

#### Coast Guard

#### 33 CFR Part 117

[CGD7-90-57]

#### Drawbridge Operation Regulations; Atlantic Intracoastal Waterway, Florida

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

**SUMMARY:** At the request of Monroe County, the Coast Guard is considering a change to the regulations governing the operation of the Jewfish Creek drawbridge at Key Largo by permitting the number of openings to be limited during certain periods. This proposal is being made because periods of peak vehicular traffic have increased. This action should accommodate the needs of vehicular traffic and should still provide for the reasonable needs of navigation.

**DATES:** Comments must be received on or before September 4, 1990.

**ADDRESSES:** Comments should be mailed to Commander (oan) Seventh Coast Guard District, 909 SE. 1st Avenue, Miami, FL 33131-3050. The comments and other materials referenced in this notice will be available for inspection and copying at Brickell Plaza Federal Building, Room 406, 909 SE. 1st Avenue, Miami, FL. Normal office hours are between 7:30 a.m. and 4 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

**FOR FURTHER INFORMATION CONTACT:** Ian MacCartney (305) 536-4103.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in this rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for concurrence with or any recommended change in the proposal.

Persons desiring acknowledgement that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, Seventh Coast Guard District, will evaluate all communications received and determine a course of final action on this proposal. The proposed regulations may be changed in light of comments received.

#### Drafting Information

The drafters of this notice are Ian MacCartney, project officer, and LCDR, D.G. Dickman, project attorney.

#### Discussion of Proposed Regulations

The Jewfish Creek drawbridge presently opens on signal except that, on Fridays from 3 p.m. to sunset, and Saturdays and Sundays from 10 a.m. to sunset, the draw need open only on the hour, twenty minutes after the hour and forty minutes after the hour. When a federal holiday occurs on a Friday, the draw need open only on the hour, twenty minutes after the hour, and forty minutes after the hour, from 12 noon to sunset on the Thursday before the holiday, and from 10 a.m. to sunset on Friday (holiday), Saturday, and Sunday. When a federal holiday falls on a Monday, the draw need open only on the hour, twenty minutes after the hour and forty minutes after the hour from 12 noon to sunset on the Friday before the holiday, and from 10 a.m. to sunset on Saturday, Sunday, and Monday (holiday). Exempt vessels are passed at any time. Monroe County and the Florida Department of Transportation have requested the existing weekend and holiday regulations be changed to a 30-minute opening schedule to help reduce highway traffic congestion. A temporary 60-day trial period of the 30-minute regulations was implemented from February 1 through April 2, 1990 to evaluate the suggested change and determine the potential impact on navigation. No comments were received indicating the proposed change would present an unreasonable impact on navigation.

#### Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal

Regulation and non-significant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 28, 1979). The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. We conclude this because the rule exempts tugs with tows. Since the economic impact of the proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant impact on a substantial number of small entities.

#### List of Subjects in 33 CFR Part 117

Bridges.

#### Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend part 117 of title 33, Code of Federal Regulations, as follows:

#### PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-1(g).

2. Paragraph (qq) of § 117.261 is revised to read as follows:

§ 117.261 Atlantic Intracoastal Waterway from St. Marys River to Key Largo.

(qq) Jewfish Creek, mile 1134, Key Largo. The draw shall open on signal; except that from 10 a.m. to sunset, Thursday through Sunday and federal holidays, the draw need open only on the hour and half hour.

Dated: July 6, 1990.

Robert E. Kramek,  
Rear Admiral, U.S. Coast Guard, Commander,  
Seventh Coast Guard District.

[FR Doc. 90-16813 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-14-M

#### FEDERAL EMERGENCY MANAGEMENT AGENCY

#### 44 CFR Part 72

RIN 3067-AB61

#### National Flood Insurance Program

AGENCY: Federal Insurance Administration (FIA), Federal Emergency Management Agency (FEMA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the National Flood Insurance Program (NFIP) regulations dealing with reimbursement procedures for the

review of proposed projects to determine if they would qualify for NFIP map revisions upon their completion. The rule would increase the rates for review services, increase the threshold levels for notifying requestors of total costs and add an additional fee category.

DATES: Comments must be received on or before August 20, 1990.

ADDRESSES: Send comments to Charles A. Lindsey, Chief, Technical Operations Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472; telephone (202) 646-2760.

FOR FURTHER INFORMATION CONTACT: Charles A. Lindsey (202) 646-2760.

SUPPLEMENTARY INFORMATION: On January 1, 1986, the Federal Insurance Administration implemented 44 CFR part 72—Procedures and Fees for Obtaining Conditional Approval of Map Changes. Its purpose was to provide cost recovery for engineering review and administrative processing associated with the issuance of conditional Letters of Map Amendment (LOMAs) and conditional Letters of Map Revision (LOMRs) for proposed floodplain modification projects. The fee structure for the issuance of these conditional LOMAs and LOMRs was based upon the then prevailing private sector labor rate of \$25.00 per hour.

A cost analysis conducted during 1988 resulted in revision of §§ 72.3 and 72.4 to reflect a revised cost of \$30.00 per hour. This change was effective on March 23, 1989.

Based on a cost analysis conducted during March 1990, it is proposed that §§ 72.3 and 72.4 be again revised to reflect the currently prevailing private sector labor rate of \$35.00 per hour. An additional fee category, Review of new hydrology, will be added under § 72.3, along with a corresponding fee. This category will be used when FEMA is requested to review new hydrologic and hydraulic models which are not based on proposed changes in the floodplain. The number of hours allotted for the review of new hydrology is seven, and the corresponding fee, at \$35.00 per hour, will be \$245.00. Additionally, the threshold levels at which requestors are notified of total costs will be increased.

FEMA has determined, based upon an Environmental Assessment, that this rule will not have a significant impact upon the quality of the human environment. As a result, an Environmental Impact Statement will not be prepared. A finding of no significant impact is included in the formal docket file and is available for

public inspection and copying at the Rules Docket Clerk, Office of General Counsel, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

This rule will not have a significant economic impact on a substantial number of small entities and, hence, has not undergone regulatory flexibility analysis.

This rule is not a "major rule" as defined in Executive Order 12291, dated February 27, 1981, and, hence, no regulatory analysis has been prepared.

FEMA has determined that this rule does not contain a collection of information as described in section 3504(h) of the Paperwork Reduction Act.

#### List of Subjects in 44 CFR Part 72

Flood insurance, Flood plains.

Accordingly, the proposed changes to 44 CFR chapter I, subchapter B, part 72 are as follows:

#### PART 72—PROCEDURE AND FEES FOR OBTAINING CONDITIONAL APPROVAL OF MAP CHANGES

1. The authority citation for part 72 will continue to read as follows:

Authority: 42 U.S.C. 4001, et seq.; Reorganization Plan No. 3 of 1978; E.O. 12127.

2. Section 72.3 will be amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

##### § 72.3 Initial fee schedule.

(a) \* \* \*

- |                                |       |
|--------------------------------|-------|
| (1) Single-lot.....            | \$175 |
| (2) Multi-lot/Subdivision..... | \$245 |

3. Section 72.3 will be amended by revising paragraphs (b)(1) through (b)(5) and adding paragraph (b)(6) to read as follows:

(b) \* \* \*

- |   |         |
|---|---------|
| (1) Review of new hydrology.....                        | \$245   |
| (2) New bridge or culvert (no channelization).....      | \$490   |
| (3) Channel modifications only.....                     | \$560   |
| (4) Channel modification and new bridge or culvert..... | \$735   |
| (5) Levees, berms or other structural measures.....     | \$945   |
| (6) Structural measures on alluvial fans.....           | \$2,800 |

#### 72.4 [Amended]

4. Section 72.4(c) introductory text will be amended by replacing "\$30.00" with "\$35.00".

5. Section 72.4 will be amended by revising paragraph (c)(2) to read as follows:

#### § 72.4 Submittal/payment procedures and FEMA response.

(c) \* \* \*

(2) Requestors of conditional LOMRs for the review of new hydrology, bridges or culverts, channel modifications, or combination bridge/culvert and channel modification will be notified of the anticipated total cost if the total cost of processing their request will exceed \$1,500.

6. Section 72.4 will be amended by revising paragraph (c)(3) to read as follows:

(c) \* \* \*

(3) Requestors of conditional LOMRs for the review of levees, dams or other structural measures will be notified of the anticipated total cost if the total cost of processing their request will exceed \$2,500.

7. Section 72.4 will be amended adding paragraphs (c)(4) and (c)(5) to read as follows:

(c) \* \* \*

(4) Requestors of conditional LOMRs for the review of structures on alluvial fans will be notified of the anticipated total cost if the total cost of processing their request will exceed \$5,000.

(5) In the event that processing costs exceed the limits defined in paragraphs (c)(1) through (c)(4) of this section, processing of the request will be suspended pending FEMA receipt of written approval from the requestor to proceed.

Issued: June 12, 1990.

Harold T. Duryee,

Federal Insurance Administrator.

[FR Doc. 90-16750 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-03-M

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[MM Docket No. 90-333, RM-7340]

#### Radio Broadcasting Services; Mora, NM

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition by Voices of the Desert seeking the allotment of Channel 284A to Mora, New Mexico, as its first local FM service. Channel 284A can be

allotted to Mora in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for this allotment are North Latitude 35-58-00 and West Longitude 105-19-48. Petitioner is requested to provide demographic data demonstrating that Mora is a community for allotment purposes since it is not listed in the 1980 U.S. Census.

DATES: Comments must be filed on or before September 6, 1990, and reply comments on or before September 21, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: NE, Jeweler, 5263 Agro Drive, Frederick, Maryland 21701 (Petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 90-333, adopted June 29, 1990, and released July 16, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

##### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Kathleen B. Levitz,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 90-16851 Filed 7-18-90; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 73

[MM Docket No. 90-334, RM-7341]

## Radio Broadcasting Services; Sweet Home, OR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Galaxy Broadcast Partners seeking the substitution of Channel 296C1 for Channel 296C2 at Sweet Home, Oregon, and the modification of its construction permit for State KSKD to specify the higher powered channel. Channel 296C1 can be allotted to Sweet Home in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in petitioner's outstanding construction permit. The coordinates for this allotment are North Latitude 44-29-02 and West Longitude 122-34-55. In accordance with § 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 296C1 at Sweet Home or require the petitioner to demonstrate

the availability of an additional equivalent class channel for use by such parties.

**DATES:** Comments must be filed on or before September 6, 1990, and reply comments on or before September 21, 1990.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Heather McDaniel, Galaxy Broadcast Partners, 33692 Santiam Highway, Lebanon, Oregon 97355 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 90-334, adopted June 29, 1990, and released July 16, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also

be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

## List of Subjects in 47 CFR Part 73

## Radio broadcasting.

Federal Communications Commission.

Kathleen B. Levitz,

Deputy Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 90-16850 Filed 7-18-90; 8:45 am]

BILLING CODE 6712-01-M

# Notices

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Forms Under Review by Office of Management and Budget

July 13, 1990.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Public Law 96-511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, room 404-W Admin. Bldg., Washington, DC 20250, (202) 447-2119.

#### Revision

- Farmers Home Administration  
7 CFR 1944-E, Rural Rental Housing  
Loan Policies, Procedures and  
Authorizations  
FmHA 1944-7, -33, -34, -35  
On occasion  
State or local governments; Businesses  
or other for-profit; Non-profit  
institutions; Small businesses or  
organizations; 20,935 responses;  
141,430 hours; not applicable under  
3504(h)

Jack Holston, 382-9736

#### New Collections

- Food Safety and Inspection Service  
Certificate of Medical Examination (Pre-  
Employment)  
On occasion  
Individuals or households; Federal  
agencies or employees; 600 responses;  
150 hours; not applicable under  
3504(h)  
Roy Purdie, Jr. (202) 447-5372

#### Reinstatement

- Farmers Home Administration  
7 CFR 1956-B, Debt Settlement—Farmer  
Programs and Housing FmHA 1956-1  
On occasion  
Individuals or households; State or local  
governments; Farms; Businesses or  
other for-profit; Small businesses or  
organizations; 29,950 responses; 14,850  
hours; not applicable under 3504(h)  
Jack Holston, 382-9736

Donald E. Hulcher,  
*Acting Departmental Clearance Officer.*  
[FR Doc. 90-16894 Filed 7-18-90; 8:45 am]  
BILLING CODE 3410-01-M

#### Forest Service

### Oil and Gas Leasing Suitability Analysis for the Routt National Forest, Routt, Moffat, Jackson, Grand, Garfield and Rio Blanco Counties, Colorado

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare environmental impact statement.

**SUMMARY:** The Forest Service will prepare an environmental impact statement to analyze and disclose the expected environmental consequences, including possible cumulative effects, when consenting or not consenting to the issuance of oil and gas leases on the Routt National Forest.

**DATES:** Comments concerning the scope of the analysis should be received in writing by September 25, 1990.

**ADDRESSES:** Send written comments to Jerry E. Schmidt, Forest Supervisor, 29587 W. US 40, suite 20, Steamboat Springs, CO, 80487.

**FOR FURTHER INFORMATION CONTACT:** Richard Hall, Planning Staff, (303) 879-1722.

**SUPPLEMENTARY INFORMATION:** This environmental analysis will identify areas that: (1) Will be open to oil and gas development subject to the terms and conditions of the standard lease form; (2) will be open to development but subject to constraints that will require the use of lease stipulations such as those prohibiting surface occupancy or controlled surface occupancy; (3) will be closed to leasing through the exercise of management direction or because of laws or regulations; on National Forest System Lands within the Routt National Forest. The analysis will include split estate lands where the minerals are federally owned and the surface is owned or managed by parties other than the Forest Service, where such lands are within the administrative boundaries of the Routt National Forest.

In preparing the environmental impact statement, the Forest Service will identify and consider a full range of alternatives, including that of no action, to help analyze the significant issues identified during the scoping process.

Public participation will be an important aspect of this analysis. The Forest Service is seeking comments and suggestions from individuals and groups or other Federal, State and local agencies who may be interested in the proposed action. To facilitate input, the Forest Supervisor has prepared a preliminary scoping document and has scheduled an open house. The open house is scheduled to be held on Aug. 15, 1990, 7 p.m., at the Bud Werner library in Steamboat Springs, CO. The preliminary scoping document is available upon request at the Forest Supervisors Office in Steamboat Springs. Information gathered during this scoping process will be used to identify significant issues associated with this analysis.

A draft environmental impact statement is expected to be filed with the Environmental Protection Agency and to be available for public review by May 1991. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the Federal Register.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the

environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1018, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)

The final environmental impact statement is scheduled to be completed by September 1991. The responsible official will consider comments, responses, environmental consequences discussed in the EIS, and applicable laws, regulations, and policies in making a decision regarding this proposal. The responsible official will document the decision in a Record of Decision. The decision will be subject to review under 36 CFR 217.6. The responsible official is Jerry E. Schmidt, Forest Supervisor, Rount National Forest.

Dated: July 13, 1990.

Jerry E. Schmidt,  
Forest Supervisor.

[FR Doc. 90-16915 Filed 7-18-90; 8:45 am]

BILLING CODE 3410-11-M

## Soil Conservation Service

### Middle Tangipahoa Watershed, Louisiana

**AGENCY:** Soil Conservation Service, USDA.

**ACTION:** Notice of a finding of no significant impact.

**SUMMARY:** Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR part 1500); and the Soil Conservation Service Guidelines (7 CFR part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Middle Tangipahoa Watershed, Tangipahoa and St. Helena Parishes, Louisiana.

**FOR FURTHER INFORMATION CONTACT:** Horace J. Austin, State Conservationist, Soil Conservation Service, 3737 Government Street, Alexandria, Louisiana, 71302, telephone (318) 473-7751.

**SUPPLEMENTARY INFORMATION:** The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national adverse impacts on the environment. As a result of these findings, Horace J. Austin, State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

The project concerns a water quality improvement plan for the Tangipahoa River, a scenic stream, located in Tangipahoa Parish, Louisiana. The planned works of improvement include installing waste management systems on approximately 50 dairies.

The Notice of a Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Horace J. Austin.

No administrative action on implementation of the proposal will be taken until 30 days after the date of this publication in the *Federal Register*.

"(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.904—Watershed Protection and Flood Prevention—and is subject to the provisions of Executive Order 12372 which requires

intergovernmental consultation with State and local officials)"

Dated: July 12, 1990.

Horace J. Austin,

State Conservationist.

[FR Doc. 90-16916 Filed 7-18-90; 8:45 am]

BILLING CODE 3410-16-M

## DEPARTMENT OF COMMERCE

### Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* Bureau of the Census

*Title:* 1990 Decennial Census—Post

*Enumeration Survey—Revisit*

*Form Number(s):* D-1301.5, D-1304L

*Agency Approval Number:* None

*Type of Request:* New collection

*Burden:* 2,871 hours

*Number of Respondents:* 8,700

*Avg Hours Per Response:* 20 minutes

*Needs and Uses:* The Bureau of the Census uses the Revisit questionnaire as a follow-up to the Post Enumeration Survey (one of the methodologies that will be used to measure the coverage of the 1990 Decennial Census). The Revisit questionnaire is designed to be useful in various census evaluation projects such as evaluating the imputation methodology of unresolved match status cases, assessing the quality of reported census day addresses, and measuring census erroneous enumerations.

*Affected Public:* Individuals or households

*Frequency:* One time only

*Respondent's Obligation:* Mandatory

*OMB Desk officer:* Don Arbuckle, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Clearance Officer, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Don Arbuckle, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: July 13, 1990.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90-16928 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-07-M

#### Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census

Title: 1990 Annual Survey of

Manufactures

Form Number(S): MA-1000(L), MA-

1000(S), MA-1000(B)

Agency Approval Number: 0607-0449

Type of Request: Revision of a currently approved collection

Burden: 200,600 hours

Number of Respondents: 81,000

Avg Hours Per Response: MA-1000(L)—3 hrs., 30 min.

MA-1000(S)—2 hrs., 6 min.

MA-1000(B)—12 min.

Needs and Uses: The Census Bureau conducts the Annual Survey of Manufactures (ASM) to provide key measures on manufacturing activity during intercensal periods. Federal agencies use the ASM's results as benchmarks for their statistical programs, including the Federal Reserve Board's Index of Industrial Production, the Bureau of Economic Analysis estimates of the gross national product, and the International Trade Administration's Industrial Outlook publication.

Affected Public: Businesses or other for-profit organizations

Frequency: Annually

Respondent's Obligation: Mandatory

OMB Desk Officer: Don Arbuckle, 395-7340

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Clearance Officer, (202) 377-3271, Department of Commerce, Room H6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Don Arbuckle, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: July 13, 1990.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90-16929 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-07-M

#### Bureau of Export Administration

##### Semiconductor Technical Advisory Committee; Partially Closed Meeting

A meeting of the Semiconductor Technical Advisory Committee will be held, August 15, 1990, 8:30 a.m., Herbert C. Hoover Building, Room 1092, 14th Street and Constitution Avenue NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions which affect the level of export controls applicable to semiconductors and related equipment or technology.

#### AGENDA:

##### GENERAL SESSION:

1. Opening Remarks by the Chairman and Commerce Representative.
2. Introduction of Members and Visitors.
3. Presentation of Papers or Comments by the Public.
4. Core List Presentation.

##### EXECUTIVE SESSION:

5. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control programs and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, in order to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that you forward your public presentation materials or comments at least one week before the meeting to the address listed below:

Ms. Ruth D. Fitts, U.S. Department of Commerce/BXA, Office of Technology & Policy Analysis, 14th & Constitution Avenue NW., Room 4069A, Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 5, 1990, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings or portions of

meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C. 552(c)(1) shall be exempt from the provisions relating to public meetings found in section 10 (a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, U.S. Department of Commerce, Washington, DC. For further information or copies of the minutes call Ruth D. Fitts, 202-377-4959.

Dated: July 13, 1990.

Betty A. Ferrell,

Director, Technical Advisory Committee Unit, Office of Technology and Policy Analysis.

[FR Doc. 90-16888 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-DT-M

#### International Trade Administration

[A-588-405]

##### Cellular Mobile Telephones and Subassemblies From Japan; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On November 30, 1989, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on cellular mobile telephones and subassemblies from Japan. The review covers two manufacturers and/or exporters of this merchandise and the period December 1, 1986 through November 30, 1987.

We gave interested parties an opportunity to comment on our preliminary results. The final results have changed from those presented in our preliminary results of review of one of the two manufacturers.

EFFECTIVE DATE: July 19, 1990.

FOR FURTHER INFORMATION CONTACT: Anne D'Alauro or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC, 20230; telephone (202) 377-2786.

## SUPPLEMENTARY INFORMATION:

## Background

On November 30, 1989, the Department of Commerce (the Department) published in the Federal Register (54 FR 49323) the preliminary results of its administrative review of the antidumping duty order on cellular mobile telephones and subassemblies from Japan (50 FR 51724, December 19, 1985). We have now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 as amended (the Tariff Act).

## Scope of the Review

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the *Harmonized Tariff Schedule* (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS number(s).

Imports covered by this review are cellular mobile telephones (CMTs), CMT transceivers, CMT control units, and certain subassemblies thereof, which meet the tests set forth below. CMTs are radio-telephone equipment designed to operate in a cellular radio-telephone system, *i.e.*, a system that permits mobile telephones to communicate with traditional land-line telephones via a base station, and that permits multiple simultaneous use of particular radio frequencies through the division of the system into independent cells, each of which has its own transceiving base station. Each CMT generally consists of (1) A transceiver, *i.e.*, a box of electronic subassemblies which receives and transmits calls; and (2) a control unit, *i.e.*, a handset and cradle resembling a modern telephone, which permits a motor-vehicle driver or passenger to dial, speak, and hear a call. They are designed to use motor vehicle power sources. Cellular transportable telephones, which are designed to use either motor vehicle power sources or, alternatively, portable power sources, are included in this antidumping duty order.

Subassemblies are any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars, and which are dedicated exclusively for use in CMT transceivers or control units. The term "dedicated exclusively for use" only encompasses those subassemblies that are specifically designed for use in

CMTs, and could not be used, absent alteration, in a non-CMT device. The Department selected the five dollar value for defining the scope since this is a value that it has determined is equivalent to a "major" subassembly. The Department feels that a dollar cutoff point is a more workable standard than a subjective determination such as whether a circuit module is "substantially complete." Examples of subassemblies which may fall within this definition are circuit modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), FR, IF, synthesizer, duplexer, power supply, power amplification, transmitter and exciter. The presumption is that CMT subassemblies are covered by the order unless an importer can prove otherwise. An importer will have to file a declaration with the Customs Service to the effect that a particular CMT subassembly is not dedicated exclusively for use in CMTs or that the dollar value is less than five dollars, if he wishes it to be excluded from the order.

The following merchandise has been excluded from this order: pocket-size self-contained portable cellular telephones, cellular base stations or base station apparatus, cellular switches, and mobile telephones designed for operation on other, non-cellular, mobile telephone systems.

Cellular mobile telephones and subassemblies were classified under *Tariff Schedules of the United States* item numbers 685.28 and 685.33; they are currently classified under HTS item numbers 8525.20.60, 8525.10.80, 8527.90.80, 8529.10.60, and 8529.90.50, 8542.20.00, and 8542.80.00. The HTS numbers are provided for convenience and customs purposes. The written product description remains dispositive.

The review covers two manufacturers and/or exporters of Japanese CMTs and subassemblies and the period December 1, 1986 through November 30, 1987.

## Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received comments from the petitioner, Motorola, and both respondents, Mitsubishi Electric Corporation and Nihon Dengyo Corporation.

## Analysis of Mitsubishi Electric Company's (MELCO) Comments

## Comment 1

MELCO argues that the Department should use constructed value (CV) as the basis of comparison with the U.S. price of imported kits because the kits

are not "such or similar" to the home market transceiver sold during the period of review. MELCO bases this argument on the large difference in merchandise adjustment necessary for the comparison. As support for this argument, MELCO cites the *Final Determination of Sales at Less Than Fair Value: Certain Small Telephone Systems and Subassemblies Thereof from Korea* (54 FR 53141; December 27, 1989) in which the Department adopted a two-prong test for selecting that merchandise which could reasonably be compared. In that case, in addition to satisfying certain technical product requirements, the difference in merchandise adjustment could not exceed 20 percent of the cost of manufacturing of the U.S. merchandise (20 percent guideline).

The Department further explained: "We found it necessary to adopt a 20 percent guideline as a second prong of our product comparison analysis in this case in order to minimize the effect of certain distortions created in our calculations caused by making a difference in merchandise adjustment." *Id.* MELCO argues that the same reasoning should be applied in this review given the fact that the required difference in merchandise adjustment for their imported kit is greater than 20 percent of the cost of producing that merchandise. Moreover, MELCO notes that the difference in merchandise adjustment is of the same magnitude as that determined in the previous administrative review to warrant the use of constructed value rather than Japan Radio Company's home market sales.

## Department's Position

We agree. Section 771(16)(C)(ii) of the Tariff Act confers upon the Department discretionary authority to identify similar merchandise which may reasonably be compared with the subject merchandise. For comparisons between MELCO's home market transceiver and their imported kit, a difference in merchandise adjustment substantially greater than 20 percent is necessary. Due to the magnitude of the difference in merchandise adjustment necessary to make this comparison, the Department has instead used constructed value in these final results of review.

## Comment 2

MELCO argues that the Department should use CV to represent foreign market value for comparison with U.S. control units rather than Canadian sales of control units. MELCO argues that

since only nine isolated single-unit sales of control units were made in Canada, such sales cannot have been made "to all purchasers in commercial quantities" or "in the ordinary course of trade to one or more selected customers in commercial quantities at a price which fairly reflects the market value of the merchandise" (19 U.S.C. section 1677(14)).

#### Department's Position

We disagree. Although only a few sales of control units were made in Canada, the number of sales of control units made in the U.S. was also small. Similarly, many of these U.S. sales were also of individual units. Therefore, absent evidence beyond the mere quantity of sales involved, the Department has no reason to conclude that sales of Canadian control units are not an appropriate measure of foreign market value.

#### Comment 3

MELCO requests that the Department clarify its position that "kits" are included in the scope of this antidumping duty order. It reasons that the Department can only include kits by virtue of the fact that the order covers complete CMTs, and the contents of included kits are considered to be "substantially complete CMTs."

#### Department's Position

The Department has consistently held that the CMT antidumping duty order includes kits of materials for assembly of a CMT (see *Final Results of Antidumping Duty Administrative Review: Cellular Mobile Telephones and Subassemblies from Japan* (54 FR 48011, 48012); November 20, 1989 (Final Results of AD Review CMTs)). Moreover, the antidumping order in this case covers subassemblies in addition to complete units, allowing specific inclusion of kits on that basis. The inclusion of subassemblies in the order has been upheld by the Court of Appeals for the Federal Circuit (*Mitsubishi Electric Corporation et al. v. United States*, Court Nos. 89-1514, 89-1515, 89-1525, 89-1540 (March 15, 1990)). Further the Department has determined that certain subassemblies imported by MELCO constitute kits by virtue of the fact that the kits in question contained all but one, and in some cases all, of the parts necessary to manufacture a CMT. The Department and the courts have interpreted antidumping duty orders covering completed products to cover also unfinished products imported for final assembly in the U.S. See, e.g., *Goldstar Co., Ltd. v. United States*, 892 F.Supp. 1382 (CIT 1988), *aff'd*, 873 F.2d

1427 (CAFC 1989). It is not, therefore, necessary to specify that kits are covered by the scope of this order based only on the rationale that "substantially complete CMTs" are covered.

#### Analysis of Motorola's Comments

##### Comment 4

Motorola states that the Department should set the cash deposit rate for Nihon Dengyo equal to that of Fujitsu, which has acquired majority interest in Nihon Dengyo. Petitioner argues that given the size of Fujitsu's financial interest in Nihon Dengyo, the Department should presume the practical ability of the former to control the production and pricing decisions of the latter. Because Fujitsu failed to respond to the Department's antidumping questionnaire in the previous administrative review resulting in the use of "best information available" (see Final Results of AD Review CMTs, 48011), no evaluation of the relevant production and pricing factors has been possible. Considering, moreover, that most CMTs are produced through generally similar processes using similar equipment, the Department should conclude that a change in production from one entity to the other could be accomplished relatively easily and inexpensively. Accordingly, the Department should establish a single cash deposit for both companies.

#### Department's Position

The Department does not agree with the petitioner that a single cash deposit should necessarily be established for related entities based solely on the extent of their financial relationship. There are numerous additional factors which would contribute to a decision to "collapse" related producers (i.e., to treat the two as a single entity). Such factors generally include the fact that the two companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions. See, e.g., *Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from France*, 52 FR 812 (January 9, 1987); *Final Determination of Sales at Less Than Fair Value: Granite from Spain*, 53 FR 24335 (June 28, 1988).

As we stated in our preceding review (Final Results of AD Review CMTs, 48015):

The sales made by Nihon Dengyo during the review period were made prior to their acquisition by Fujitsu. Aside from the degree of financial interest held by Fujitsu in Nihon Dengyo, we do not have sufficient information to enable us to conclude that the parties do not operate separate and independent sales and production operations.

For this reason, the Department will continue to set separate cash deposit rates for each manufacturer.

These facts remain unchanged since Nihon Dengyo's sales during this review period were consummated prior to the Fujitsu acquisition. Nihon Dengyo has fully cooperated with the Department in the course of these reviews and we consider the result of analysis of their sales is the best indicator of estimated dumping margins on future sales. Absent more compelling evidence to enable the Department to determine that Fujitsu and Nihon Dengyo's sales and production operations have become so wed as to be treated as a single entity, the Department will continue to set separate cash deposit requirements for each. We also note that entries of Nihon Dengyo's CMTs continue to be subject to suspension of liquidation and to requests for review. Any change in pricing practices will be reflected in the results of any reviews, if requested, and affect future deposit rates.

#### Comment 5

Motorola argues that Nihon Dengyo did not report any development costs for the models sold during this period of review, on the grounds that all such costs had been amortized over units produced and sold in a previous period. Following the Department's decision to reallocate development expenses for Nihon Dengyo in a consistent manner for all models (see Final Results of AD Review CMTs, 48015), Motorola argues that the resulting adjustment affects models sold during this review.

#### Department's Position

We agree and have included the applicable development costs in our constructed value for affected models in this review. This information was submitted by Nihon Dengyo in the administrative record in this proceeding.

#### Comment 6

Petitioner argues that, despite the fact that the product sold in the U.S. by MELCO is a complete CMT unit with many advanced features and, therefore, should have a higher value in the marketplace while the product sold in Japan is an incomplete unit with only moderate features and should have a lower value in the marketplace, the Department has nonetheless accepted the large difference in merchandise adjustment which reduces foreign market value. Furthermore, the difference in merchandise adjustment between these products is meant to guide the Department only to the extent that any price differential "is wholly or

partly due to" such differences (§ 353.57 of the Department's regulations and 19 U.S.C. 1677(a)(4)), i.e., only when such physical differences affect the consumer value of the product. In this case, Motorola contends, there is no basis to conclude that the claimed variable cost difference had any impact on the value of the product in the eyes of the consumer or on the price of the product. For this reason, Motorola states that the Department should reject the difference in merchandise adjustment reported by MELCO.

#### Department's Position

In the final results of review, the Department used constructed value as the basis of foreign market value for comparison with the CMT kits imported by MELCO since we determined that the kits and home market transceivers were not similar merchandise. For this reason, the Department no longer applied the difference in merchandise adjustment questioned by Motorola.

#### Comment 7

Motorola further faults the MELCO difference in merchandise adjustment including the reliance by the Department on the use of variable cost differences between the products in quantifying that adjustment. They reason that, while variable cost differences may accurately reflect physical value differences in the case of basic products (such as steel, plastic, or simple fabricated articles), in the case of electronic products such as CMTs, higher variable costs are generally offset by lower development engineering and capital costs. Accordingly, they argue that reference to variable costs alone in making a difference in merchandise adjustment would produce a result completely unrelated to the selling price or value for this type of product.

#### Department's Position

See the Department's Position in response to comment 6.

#### Comment 8

Because MELCO takes the position that portions of their kits exported to the U.S. include "non-covered parts," Motorola requests assurance that all parts contained in the kit are included in our antidumping calculations and any associated allocations.

#### Department's Position

The Department has consistently considered the contents of a kit in its entirety.

#### Comment 9

The Department should be adding a proportion of profit in its calculation of value-added for CMT kits completed in the United States.

#### Department's Position

We agree. In arriving at a U.S. price in its final results of review for MELCO's kit, the Department has adjusted for all U.S. value-added, including that proportion of profit attributed to U.S. value.

#### Comment 10

Motorola argues that MELCO's start-up expenses for U.S. production were spread over projected capacity estimates that are excessive since they exceed MELCO's own projected life cycle for CMTs.

#### Department's Position

We agree and have adjusted our calculation to reflect MELCO's own projected estimate of the life cycle of its CMTs.

#### Comment 11

Motorola contends that those CMTs which MELCO donated free of charge to certain charitable organizations should either be treated as zero-priced sales in the Department's dumping analysis or, at the very least, should be included as a direct selling expense incurred during the period of review.

#### Department's Position

These donated CMTs referred to by Motorola are included as a SG&A expense of the applicable period and in the allocation of that pool of expenses to sales made during the corresponding period. Moreover, the donated CMTs are not in the nature of a direct selling expense since they bare no direct relationship to the sales under consideration; they are properly treated as an indirect expense.

#### Comment 12

Motorola questions whether the interest income allowed as an offset to MELCO's interest expense was attributable to CMT operations.

#### Department's Position

The interest income claimed by MELCO as an offset to interest expense was interest earned on compensatory balances. The Department does not require that such interest be exclusively related to the merchandise subject to review, only to the operations of the seller, as opposed to investment income. Given the frequent changes in balances and the revolving nature of short term deposit and loan accounts, it would be

practically impossible to trace the specific source of each deposit or withdrawal to a particular sale, or type of sale. Allocation of income to particular merchandise must necessarily be on a proportional basis. Short-term interest income, such as that earned on compensatory balances, which is related to the ordinary course of business, is accepted as an offset to short-term interest expense. (See *Final Results of Administrative Review: Titanium Sponge from Japan* (52 FR 4799, February 17, 1988.)) No offset was claimed on long-term instruments or investment income that is not allowed as an offset by the Department.

#### Final Results of the Review

As a result of the comments received, we have revised our preliminary results, and determine that the following margins exist for the period December 1, 1986 through November 30, 1987:

Manufacturer	Margin (percent)
Mitsubishi Electric Corporation.....	.42
Nihon Dengyo.....	0

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service. Individual differences between United States price and foreign market value may vary from the percentages stated above.

Further, as provided for by section 751(a)(1) of the Tariff Act, because there was no margin for Nihon Dengyo and the margin for MELCO was *de minimis*, no cash deposit will be required for these manufacturers. For shipments from the remaining known manufacturers or exporters not covered by this review, the cash deposit will continue to be at the rate established in the final results of administrative review (54 FR 48011; November 20, 1989) or the antidumping duty order (50 FR 51724; December 19, 1985), as applicable. The cash deposit for TDK Corporation remains at .95 percent (see *Cellular Mobile Telephones and Subassemblies from Japan; Final Results of Antidumping Duty Administrative Review*: 55 FR 5867, February 20, 1990).

For any future entries of this merchandise from a new exporter not covered in this or prior reviews, whose first shipments occurred between December 1, 1986 and November 30, 1987 and who is unrelated to any reviewed firm, no cash deposit shall be

required. For any future entries of this merchandise by a new exporter not covered in this or prior reviews, whose first shipments occurred after November 30, 1987, and who is unrelated to any reviewed firm, a cash deposit of .95 percent shall be required. *Id.* These deposit requirements are effective for all shipments of Japanese cellular mobile telephones and subassemblies entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.22 of the Department's regulations.

Dated: July 6, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-16784 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-DS-M

#### Export Trade Certificate of Review

**ACTION:** Notice of issuance of an amended Export Trade Certificate of Review, Application No. 89-2AE18.

**SUMMARY:** The Department of Commerce issued an amended Export Trade Certificate of Review to the Outdoor Power Equipment Institute, Inc. on July 6, 1990. The original Certificate was issued on March 19, 1990. Notice of issuance of the Certificate was published in the Federal Register on March 26, 1990 (55 FR 11041).

**FOR FURTHER INFORMATION CONTACT:** Douglas J. Aller, Director, Office of Export Trading Company Affairs, International Trade Administration, 202-377-5131. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:** Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4011-21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing title III are found at 15 CFR part 325 (1990) (50 FR 1804, January 11, 1985).

The Office of Export Trading Company Affairs is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of a Certificate in the Federal Register. Under section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the

United States to set aside the determination on the ground that the determination is erroneous.

#### Description of Amended Certificate

Export Trade Certificate of Review NO. 80-00018 was issued to the Outdoor Power Equipment Institute, Inc. ("OPEI") on March 19, 1990. Notice of issuance of the Certificate was published in the Federal Register on March 26, 1990 (55 FR 11041). Notice of OPEI's application for an amendment to the Certificate was published in the Federal Register on May 29, 1990 (55 FR 21766).

OPEI's Export Trade Certificate of Review has been amended by adding the "Ariens Company" as a "Member" of the Certificate.

Pursuant to section 304(a)(2) of the ETC Act, 15 USC 4014(a)(2), and 15 CFR 325.7, the amended Certificate is effective from May 22, 1990, the date on which the application for an amendment was deemed submitted.

A copy of the amended Certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Dated: July 12, 1990.

Douglas J. Aller,

Director, Office of Export Trading Company Affairs.

[FR Doc. 90-16786 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-DR-M

#### Short-Supply Determination; Certain Hot-Rolled D6A Alloy Steel Strip

**AGENCY:** Import Administration/International Trade Administration, Commerce.

**ACTION:** Notice of short-supply determination.

**SHORT-SUPPLY REVIEW NUMBER:** 21.

**SUMMARY:** The Secretary of Commerce ("Secretary") hereby grants a short-supply allowance for 700 net tons of certain hot-rolled D6A alloy steel strip, used in the production of bi-metal band saws, for the remainder of 1990 under the U.S.-EC steel arrangement.

**EFFECTIVE DATE:** July 11, 1990.

**FOR FURTHER INFORMATION CONTACT:** Sally A. Craig or Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230 (202) 377-3910 or (202) 377-0159.

**SUPPLEMENTARY INFORMATION:** On June 28, 1990, the Secretary received an

adequate short-supply petition from Theis Precision Steel Corporation ("Theis") requesting a short-supply allowance for 700 net tons of certain hot-rolled D6A alloy steel strip under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products. Theis requested short supply for this product because no domestic mill is currently able to produce this material and because its foreign suppliers are unable to meet Theis' total needs through regular export licenses. The Secretary conducted this short-supply review pursuant to section 4(b)(4)(A) of the Steel Trade Liberalization Program Implementation Act, Pub. L. 101-221, 103 Stat. 1886 (1989) ("the Act"), and § 357.102 of the Department of Commerce's Short-Supply Regulations, published in the Federal Register on January 12, 1990, 55 FR 1348 ("Commerce's Short-Supply Regulations").

The requested product is a certain grade of D6A steel hot-rolled strip (black or descaled as specified by purchase order) suitable for electron beam welding that meets the following specifications:

*Thickness range:* 0.080-0.125 inch.

*Width range:* 10-16 inches.

*Chemical Composition (Ladle Analysis):* Carbon (0.45-0.50); Manganese (0.60-0.90); Phosphorus (0.015 max.); Sulfur (0.010 max., aim as low as possible); Silicon (0.10-0.25); Nickel (0.50-0.70); Chromium (0.90-1.10); Molybdenum (0.90-1.10); Vanadium (0.08-0.15); Copper (0.20 max.); Aluminum (0.05-0.10, acid soluble); Hydrogen (15 ppm max.); Nitrogen (300 ppm max.); and Oxygen (150 ppm max.).

*Condition:* High quality steel made by the best steelmaking practice necessary to produce an extremely clean sound steel required for good electron beam welds.

*Quality Requirements of Hot-Rolled Strip:*

a. *Non-Metallic Inclusion Rating:* Utilize a sampling plan as outlined under Article 6 of ASTM E454-81.

b. *Surface Quality:* Inspection of the hot acid descaled surface shall reveal no detrimental surface defects such as slivers, shingle seams, lubs, cold shuts, etc. which would affect the finished cold-rolled product.

*Internal Soundness:* A transverse section deep etched in hot acid and examined shall show no primary or secondary pipe, excessive segregation porosity or other injurious internal defects.

**Microstructure:**

a. **Grain size:** The McQuaid Ehn grain size shall be fine 6-8 as determined in accordance with ASTM E112-81 Annex A-3.

b. **Decarburization:** Shall be determined on transverse specimens taken one inch from the edges and the center of the strip properly polished and etched and microscopically measured for partial and complete decarburization.

c. **General Microstructure:** Shall be typical hot band fine pearlitic structure with minimum martensite

**Edge:** Shall be the natural #2 mill edge or #3 slit edge and does not have to conform to any definite contour.

**Size Variation Limits:**

a. **Width:** The tolerance for mill edge width shall not exceed  $\pm 0.062$  inch for a width of 10 inches and  $\pm 0.094$  inch for widths over 10 inches.

b. **Camber:** Shall be measured by placing an 8-foot straight edge on the concave side edge and measuring the greatest distance between the straight edge and the steep strip. The camber shall not exceed 1/4 inch in 8 feet.

**Size of Coils:** The inside diameter shall be 16-24 inches. The outside diameter shall be 54 inches max. with 16 inches I.D.; however, 58 inches max. O.D. shall be allowed with 20-24 inches I.D. if the band is pickled and annealed. There shall be no fish tail ends.

**Action**

On June 26, 1990, the Secretary established an official record on this short-supply request (Case Number 21) in the Central Records Unit, room B-099, Import Administration, U.S. Department of Commerce at the above address. Section 4(b)(4)(B)(i) of the Act and § 357.106(b)(1) Commerce's Short-Supply Regulations require the Secretary to apply a rebuttable presumption that a product is in short supply and to make a determination with respect to a short-supply petition not later than the 15th day after the petition is filed if the Secretary finds that one of the following conditions exists: (1) The raw steelmaking capacity utilization in the United States equals or exceeds 90 percent; (2) the importation of additional quantities of the requested steel product was authorized by the Secretary during each of the two immediately preceding years; or (3) the requested steel product is not produced in the United States.

The Secretary finds that short-supply allowances for the requested steel product were authorized during each of the two immediately preceding years. Therefore, the Secretary has applied a rebuttable presumption that this product is presently in short supply in

accordance with section 4(b)(4)(B)(i)(II) of the Act and § 357.106(b)(1)(ii) of Commerce's Short-Supply Regulations. Unless domestic steel producers provided proof that they could and would produce and supply the requested quantity of this product within the requested period of time, provided it represented a normal order-to-delivery period, the Secretary would issue a short-supply allowance not later than July 11, 1990. On July 2, 1990, the Secretary published a notice in the Federal Register announcing a review of this request and providing domestic steel producers an opportunity to rebut the presumption of short supply. All comments were required to be received no later than July 9, 1990. No comments were received.

**Conclusion**

Since the Secretary received no comments to the Federal Register notice by potential suppliers to rebut the Secretary's presumption of short supply for the requested product, the Secretary hereby grants, pursuant to section 4(b)(4)(A) of the Act and § 357.102 of Commerce's Short-Supply Regulations, and short-supply allowance for 700 net tons of the requested hot-rolled D6A alloy steel strip for the remainder of 1990 under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products.

Dated: July 11, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-16785 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-DS-M

**National Oceanic and Atmospheric Administration****Mid-Atlantic Fishery Management Council; Public Meeting**

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

The Mid-Atlantic Fishery Management Council will hold a public meeting on August 8-9, 1990, at the Radisson Hotel, 700 King Street, Wilmington, DE. The Council will begin meeting on August 8 at 8 a.m., and adjourn on August 9 at 5 p.m.

The Council will discuss Amendment #1 to the Summer Flounder Plan, review the budget for 1991-1993, and consider other fishery management matters as deemed necessary. The Council also may hold a closed session (not open to

the public) to discuss personnel and/or national security matters.

For further information contact John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, room 2115, Federal Building, 300 South New Street, Dover, DE 19901; telephone: (302) 674-2331.

Dated: July 12, 1990.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 90-16789 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-22-M

**Marine Mammals; Issuance of Modification; Center for Coastal Studies (P444)**

Notice is hereby given that pursuant to the provisions of §§ 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216) and the regulations governing endangered species permits (50 CFR parts 217-222), Scientific Research Permit No. 682 issued to Center for Coastal Studies, Box 826, Provincetown, Massachusetts 02657, on October 19, 1989, is modified in the following manner:

Section A.2 is changed to read:

2. During any single photo-identification attempt, animals may not be approached in a manner contrary to the Guidelines (e.g., closer than the minimum approach distance of 100 feet) more than three times in succession. Each approach shall be counted as a take against the authorized number.

Section A.3 is added:

3. During the course of research activities, sloughed pieces of epidermal and dermal tissue from humpback whales and other cetaceans may be collected and exported for DNA analysis.

This modification authorizes an additional taking for the collection and export of sloughed skin. However, this additional taking will not result in any additional risk or disadvantage to the individual animals or their population.

This modification becomes effective upon publication in the Federal Register.

Documents submitted in connection with the permit are available for review in the following offices:

By appointment: Office of Protected Resources, Permit Division, National Marine Fisheries Service, 1335 East West Hwy., suite 7324, Silver Spring, MD 20910; and

Director, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, Massachusetts 01930.

Dated: July 3, 1990.

Nancy Foster,

Director, Office of Protected Resources,  
National Marine Fisheries Service.

[FR Doc. 90-16824 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-22-M

### South Atlantic Fishery Management Council; Public Meetings

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

The South Atlantic Fishery Management Council's Finance and Executive Committees will hold public meetings on July 23-24, 1990, to discuss and set the budgets for calendar years 1991 through 1993, and to schedule Council activities for 1991.

The Committees will meet on July 23, 1990, from 10 a.m. to 5 p.m., and on July 24 from 8:30 a.m. to 3 p.m., at the Council Headquarters (address below).

For more information contact Robert K. Mahood, Executive Director, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699; telephone: (803) 571-4366.

Dated: July 13, 1990.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 90-16823 Filed 7-18-90; 8:45 am]

BILLING CODE 3510-22-M

### DEPARTMENT OF DEFENSE

#### Corps of Engineers, Department of the Army

### DEPARTMENT OF ENERGY

#### Bonneville Power Administration

### DEPARTMENT OF THE INTERIOR

#### Bureau of Reclamation

#### Pacific Northwest Coordination Agreement and Canadian Entitlement Allocation Agreement

**AGENCY:** Corps of Engineers (Army), Bonneville Power Administration (Energy), Bureau of Reclamation (Interior).

**ACTION:** Notice of intent to prepare a draft environmental impact statement (EIS) and conduct public meetings.

**SUMMARY:** Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, as amended, the Corps of Engineers (Corps), the Bureau of Reclamation (Reclamation), and the Bonneville Power Administration (BPA)

plan to prepare and consider a Draft EIS on two proposed contracts: (1) a renewed Pacific Northwest Coordination Agreement (Coordination Agreement) to be executed by the three Federal agencies with a number of Pacific Northwest utilities; and (2) a renewed Canadian Entitlement Allocation Agreement (Allocation Agreement) to be executed by BPA with Pacific Northwest utilities. Alternative modifications to these two agreements will also be evaluated. A renewed Coordination Agreement is needed to coordinate operation of Columbia River Basin Federal and non-Federal power facilities for the purpose of electric power production, within the limits of operating requirements established for multiple use of the projects. An allocation Agreement is needed to allocate among BPA and other U.S. utilities the responsibility to provide for orderly delivery to Canada of the Canadian Entitlement pursuant to the U.S.-Canada Columbia River Treaty. The Draft EIS would include five Federal Columbia River hydroelectric storage projects—Hungry Horse and Grand Coulee, operated by Reclamation, and Libby, Albeni Falls, and Dworshak, operated by the Corps—and nine Federal downstream run-of-river projects—Chief Joseph, Lower Granite, Little Goose, Lower Monumental, Ice Harbor, McNary, John Day, The Dalles, and Bonneville Dam, all operated by the Corps. In order to consider all river uses and relationships to power-related contract decisions, the three agencies will conduct a comprehensive Columbia River System Operation Review (SOR) public process to examine the questions involved in balancing operation of the dams to serve their multiple uses which include some or all of the following: flood control, electric power, fish and wildlife, recreation, irrigation, and navigation.

**DATES AND LOCATIONS:** Scoping meetings for the EIS will be held from August 6 to August 21, 1990, in the following locations. All interested parties are invited to attend.

#### State of Idaho

August 8, 1990, 7-10 p.m.  
Dover Federal Building  
Highway 2  
Sandpoint, Idaho

August 15, 1990, 7-10 p.m.  
Red Lion Hotel Downtowner  
1800 Fairview Avenue  
Boise, Idaho

August 16, 1990, 7-10 p.m.  
Orofino High School Cafeteria  
300 Dunlop Road  
Orofino, Idaho

#### State of Montana

August 9, 1990, 7-10 p.m.  
Senior Citizens Center  
206 East Second  
Libby, Montana

August 10, 1990, 2-6 p.m.  
Eureka School Gymnasium  
Eureka, Montana

August 13, 1990, 1-4 p.m.  
Inn on Broadway  
1609 W. Broadway  
Missoula, Montana

August 14, 1990, 7-10 p.m.  
Cavanaugh's Motor Inn  
N. 20 Main Street  
Kalispell, Montana

#### State of Oregon

August 20, 1990, 7-10 p.m.  
Red Lion Pendleton  
304 SE. Nye Avenue  
Pendleton, Oregon

August 21, 1990, 1-4 p.m.  
Federal Building East, Room 223  
911 NE. 11th Avenue  
Portland, Oregon

#### State of Washington

August 6, 1990, 1-4 p.m.  
Seattle Airport Hilton, Alpine Room  
17820 Pacific Highway S.  
Seattle, Washington

August 7, 1990, 7-10 p.m.  
City Hall  
300 Lincoln Street  
City of Coulee Dam, Washington

August 8, 1990, 1-4 p.m.  
West Coast Ridpath, Legend Room A  
W. 515 Sprague  
Spokane, Washington

August 17, 1990, 1-4 p.m.  
Cavanaugh's Motor Inn, Ballroom 5  
1101 North Columbia Center  
Boulevard  
Kennewick, Washington

Comments on the scope of the Draft EIS should be submitted to the address below by close of business, Thursday, September 20, 1990. The Draft EIS is expected to be available for public review in summer, 1992.

**ADDRESSES:** Written comments should be addressed to: Columbia River System Operation Review Interagency Team, P.O. Box 2988, Portland, Oregon, 97208-2988.

#### FOR FURTHER INFORMATION CONTACT:

Witt Anderson, Special Assistant—  
Columbia River System Operation Review, North Pacific Division, Corps of Engineers, P.O. Box 2870, Portland, OR 97208-2870; (503) 326-3829.

Roy Fox, Coordination and Review Manager—BPA-PG, P.O. Box 3621, Portland, OR 97208, (503) 230-4261.

Robert Barbo, Special Assistant to the Regional Director—Columbia River Operation, Bureau of Reclamation, 550 West Fort Street, Boise, ID 83724, (208) 334-1393.

*Information May Also Be Obtained From*

Jerry Schmunk, Public Affairs Office, North Pacific Division, Corps of Engineers, P.O. Box 2870, Portland, OR 97208, (503) 326-3768.

Jo Ann Scott, Public Involvement Manager—BPA, P.O. Box 12999, Portland, OR 97212, (503) 230-3478; toll-free 800-452-8429 (in Oregon); 800-547-6048 (in other Western States).

Steve Wade, Regional Public Affairs Officer—Bureau of Reclamation, 550 West Fort Street, Boise, ID 83724, (208) 334-1393.

**SUPPLEMENTARY INFORMATION:**

*Proposed Actions*

Two actions are proposed. First, the three agencies propose to renew the Pacific Northwest Coordination Agreement. This agreement would be signed by each of the agencies and other regional utilities. This action is needed to coordinate multiple use operation of Columbia River Basin Federal facilities with non-Federal facilities for the purpose of electric power production. Second, BPA proposes to renew its Allocation Agreement on Canadian Entitlement with U.S. Pacific Northwest utilities. This agreement should be renewed prior to 1994 in order to provide for the orderly return to Canada, beginning in 1998, of power to which Canada is entitled under the U.S.-Canada Columbia River Treaty. One assumption behind the Treaty is that downstream electric power benefits resulting from Canadian storage are produced by a coordinated U.S. system. One half of these downstream benefits, known as the "Canadian Entitlement", is owned by Canada but was sold to U.S. parties for 30 years. The Canadian Entitlement will be returned to Canada beginning in 1998. The electric power operation provisions of the Coordination Agreement are intended to cover any operations necessary for the Allocation Agreement.

In order to consider electric power-related contract decisions in context with other river uses, the three agencies will conduct the comprehensive Columbia River SOR public process in conjunction with the EIS to identify and evaluate multiple use water resource issues. The Columbia River SOR process is important to the Coordination Agreement because operating

requirements which are originated outside the Coordination Agreement by project owners can affect the amount of power production. The Coordination Agreement is intended to maximize power production of the combined resources of the parties within these operating requirements.

The Columbia River SOR process will provide information on current operating practices including those developed under the Coordination Agreement, the U.S.-Canada Treaty, and each agency's procedures. This will provide a common information base for public discussion of balancing multiple river uses. The Columbia River SOR process will consider questions regarding current or proposed operating requirements which affect the timing and quantity of streamflow and reservoir elevations.

*Scope of Environmental Analysis*

Alternatives which may be studied for the Draft EIS include:

*Alternatives for the Coordination Agreement*

1. Renewal of existing Coordination Agreement with little or no change.
2. Renewal of existing coordination Agreement with associated modified operating procedures.
3. No coordination—existing agreement expires in 2003 and Columbia River power operations are not coordinated.
4. Renewal of the agreement with one or more major changes, such as:
  - a. contract provisions specifying operating requirements for other purposes such as flood control, anadromous fish passage, or recreation.
  - b. provisions on thermal plant coordination.

*Alternatives for Allocation Agreement*

1. Renewal of existing agreement with little or no change.
2. Renewal of agreement with modification.
3. No renewal of agreement—responsibilities to return Canadian entitlement would be allocated by another process.

Possible impact areas and related issues may include:

1. Flood control;
2. Anadromous fish—flows and passage past dams;
3. Recreation;
4. Resident fish;
5. Electric power costs;
6. New Power Sources;

7. Wildlife;
8. Navigation, etc.

*Related BPA National Environmental Policy Act Processes*

In addition to this joint EIS, BPA is proposing to prepare two other major programmatic EIS's over the next several years. The first such EIS concerns BPA's Resource Program. BPA's Resource Program is prepared biennially to meet the Administrator's obligation to serve loads placed on BPA. The Resource Program articulates the plan BPA will use in meeting its load obligations and explains the analytic basis for that plan and the reasons it is preferred over alternative resource plans. The Resource Program also provides the basis for energy resource program budgets and explains how they are derived. The Resource Program EIS will look at environmental effects, trade-offs among resources and cumulative effects of adding resources to the existing system.

The System Operation Review process could lead to decisions affecting regional hydropower capability or operating flexibility. Because of the dominance of hydropower in the existing Federal System, these decisions could affect BPA's Resource Programs. The Resource Program EIS will be scoped to accommodate potential changes in the hydrosystem.

The other programmatic EIS BPA is considering will focus on marketing and transmission issues, including non-Federal access to the Pacific Northwest-Pacific Southwest Intertie, various types of exchange and capacity sales, and expansion of interregional transmission. Decisions on sales outside and within the Pacific Northwest could influence the need for and timing of resource actions. The Resource Program EIS will include energy and capacity sales in its consideration of resources to meet BPA's load obligations.

Issued in Washington, DC on July 9, 1990.

Dennis B. Underwood,  
Commissioner, Bureau of Reclamation.

Dated: July 10, 1990.

Pat M. Stevens IV,  
Brigadier General, USA Commanding, North Pacific Division.

Dated: July 11, 1990.

James J. Jura,  
Administrator, Bonneville Power Administration.

[FR Doc. 90-16930 Filed 7-18-90; 8:45 am]

BILLING CODE 6450-01-M

## DEPARTMENT OF ENERGY

## Financial Assistance Award, Intent To Award a Grant to Rensselaer Polytechnic Institute

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice of unsolicited financial assistance award.

**SUMMARY:** The Department of Energy (DOE) announces that pursuant to 10 CFR 600.8(a)(2), it is making a financial assistance award based on an unsolicited application satisfying the criteria of 10 CFR 600.14(e)(1) under Grant Number DE-FG01-90CE15461 to Rensselaer Polytechnic Institute to produce and test new high-performance quinoline-type plastic polymers in the laboratory at Rensselaer Polytechnic Institute which will have a total estimated cost of \$84,780 to be provided by DOE.

**SCOPE:** The grant will provide funding for the institute to prepare polyaminoquinoline type plastics and test their physical properties in the laboratory.

The purpose of the project is to produce a high-performance quinoline-type plastic polymer to replace less satisfactory current plastic materials used for their strength and/or dielectric properties. It is estimated that when fully implemented, this technology could save approximately 345 million kwh, or 1.5 million barrels of oil each year.

**ELIGIBILITY:** Based on the receipt of an unsolicited proposal, eligibility for this award is being limited to Rensselaer Polytechnic Institute, an institute with high qualifications in this specialized field of technology. It has been determined that this project has high technical merit, representing an innovative and novel ideas which has a strong possibility of allowing for future reductions in the Nation's energy consumption.

The term of the grant shall be 24 months from the effective date of the award.

**FOR FURTHER INFORMATION CONTACT:** U.S. Department of Energy, Office of Procurement Operations, Attn: Steve Patton, PR-541, 1000 Independence Avenue SW., Washington, DC 20585. Thomas S. Keefe,

Director, Contract Operations Division "B", Office of Procurement Operations.

[FR Doc. 90-16844 Filed 7-19-90; 8:45 am]

BILLING CODE 6450-01-M

## Bonneville Power Administration

## IP-PF Rate Link Extension and Opportunity for Public Review and Comment

**AGENCY:** Bonneville Power Administration (BPA), DOE.

**ACTION:** Notice of opportunity for review and comment. BPA File No: IP-PF-90. BPA requests that all comments and documents intended to become part of the official record in the extension of the Industrial Firm Power (IP)-Priority Firm Power (PF) Rate Link (Link) contain the file designation IP-PF-90.

**SUMMARY:** BPA proposes to extend the IP-PF Link which is the methodology establishing the formal relationship between the rates charged to BPA's direct-service industrial (DSI) customers and the rates charged to BPA's public body and cooperative (preference) customers required by section 7(c)(2) of the Pacific Northwest Electric Power Planning and Conservation Act (Pacific Northwest Power Act). The Link was instituted in 1986 and will expire with the current rates. The Link has achieved the goals of enhancing BPA's revenue stability and resource planning certainty by achieving greater rate predictability for the DSIs and reducing controversy in rate cases for all customers. In order to continue these benefits, BPA proposes to extend the use of the link methodology through rate periods commencing on or before the termination date of the Variable Industrial (VI) rate contract or September 30, 1995, whichever is later.

**Responsible Official:** Mr. Sydney D. Berwager, Director, Division of Contracts and Rates, is the official responsible for the development of BPA's wholesale power and transmission rates.

**DATES:** Persons wishing to become a party to the proceedings must notify BPA in writing of their intention to do so in accordance with requirements stated later in this notice. Petitions to intervene must be received by July 24, 1990, and should be addressed as follows: Honorable Dean F. Ratzman, Hearing Officer, c/o John Ciminello—APR, Hearing Clerk, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon 97212. In addition, a copy of the intervention must be served on BPA's Office of General Counsel—APR, P.O. Box 3621, Portland, Oregon 97208.

BPA will profile the testimony of its witnesses on July 19, 1990. Copies will be available in BPA's Public Information Center and will be mailed to all parties to BPA's 1989 general rate proceeding and to others who so request.

A prehearing conference will be held before the Hearing Officer at 9:30 a.m. on July 26, 1990, in the BPA Hearing Room, room 223, 1002 NE. Holladay, Portland, Oregon. Registration for the prehearing conference will begin at 8:30 a.m. At the prehearing conference, the Hearing Officer will rule on all intervention petitions and oppositions to intervention petitions, establish additional procedures, establish a service list, establish a procedural schedule, and consolidate parties with similar interests for purposes of filing jointly sponsored testimony and briefs, and expediting cross-examination. A notice of the dates and times of the hearings will be mailed to all parties of record. Objections to orders issued by the Hearing Officer at the prehearing conference must be made at the prehearing conference in person or through a representative.

The following proposed schedule is provided for informational purposes. A final schedule will be established by the Hearing Officer at the prehearing conference:

- July 19, 1990: BPA direct case filed. Available at BPA's Public Information Center, 905 NE. 11th, 1st Floor, Portland, Oregon.
- July 24, 1990: Deadline for petitions to intervene.
- July 26, 1990: Prehearing conference to set schedule and act on petitions to intervene. A clarification session, if necessary, may be scheduled.
- August 13, 1990: Parties' direct case and rebuttal to BPA direct testimony filed.
- August 29, 1990: Litigants' rebuttal to parties' testimony filed.
- September 5-6, 1990: Cross examination.
- September 25, 1990: Draft Record of Decision.
- October 17, 1990: Final Record of Decision.
- ADDRESSES:** Written comments should be submitted to the Public Involvement Manager—ALP, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon 97212.
- FOR FURTHER INFORMATION CONTACT:** Mr. Paul Hansen, Public Involvement office, at the address listed above or at 503-230-3478. BPA has toll-free numbers available: Oregon callers may use 800-452-8429; callers in California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming may use 800-547-6048. Information may also be obtained from: Mr. George E. Gwinnutt, Lower Columbia Area Manager, Suite 243, 1500 NE. Irving Street, Portland, Oregon 97232, 503-230-4551. Mr. Robert N. Laffel, Eugene District Manager, Room 206, 211 East Seventh

Street, Eugene, Oregon 97401, 503-687-6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509-353-2518.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406-329-3060.

Mr. Ronald K. Rodewald, Wenatchee District Manager, Room 307, 301 Yakima Street, Wenatchee, Washington 98801, 509-662-4377, extension 379.

Mr. Terence G. Esvelt, Puget Sound Area Manager, Suite 400, 201 Queen Anne Avenue, Seattle, Washington 98109-1030, 206-442-4130.

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, 101 West Poplar, Walla Walla, Washington 99362, 509-522-6225.

Mr. Richard J. Itami, Idaho Falls District Manager, 1527 Hollipark Drive, Idaho Falls, Idaho 83401, 208-523-2706.

Mr. Thomas H. Blankenship, Boise District Manager, Room 494, 550 West Fort Street, Boise, Idaho 83724, 208-334-9137.

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

- I. Background
- II. Proposal
- III. Relevant Statutory Provisions
- IV. Procedures Governing This Rate Proposal
- V. Scope

#### Background

##### A. History of the IP-PF Rate Link

In the early 1980's the amount of electric power demanded by BPA's DSI customers, particularly the aluminum plants, fluctuated dramatically. The changing demand for power caused problems for BPA and introduced uncertainty about BPA's resource planning, financial strength, and rate stability.

The Pacific Northwest Power Act required a change in the way rates to the DSIs were set after 1985. Section 7(c)(2) of the Act specifies that after July 1, 1985, the DSI rate shall be based upon the Administrator's applicable wholesale rates to public body and cooperative customers, and the typical margins included by these customers in their retail industrial rates. In the calculation of the DSI rate, other factors are to be taken into account, such as comparative character and size of the loads served, the relative cost of electric capacity, energy, transmission and related delivery facilities, and other service provisions as well as direct and indirect overhead costs. Given the complexity of the legislated provisions,

it became clear that there was a need for a long term formula to formalize the link between the PF rate and the rate(s) applicable to the DSIs.

The issue of the DSIs' long-term viability was raised during the development of BPA's 1985 wholesale power rates. The DSIs argued that predictable and stable rates were necessary for them to make long-term investment decisions. The BPA Administrator recognized a need to establish a formula for the link between the IP and PF rates in some formal, long-term fashion, to provide the DSIs with rate certainty for planning investments, and to reduce the contentiousness of future BPA rate cases. Such a long-term formula link was not established in the 1985 rate proceeding, but the Administrator pledged "to facilitate the development and adoption of a long-term policy" to link the two rates. 1985 Administrator's Record of Decision (ROD), WP-85-A-02, 245.

In 1985, BPA concluded an analysis of mid- to long-term policy and rate options available to the Administrator to address the problems caused by fluctuations in the DSI demand for electricity. The DSI Options Study announced BPA's decision to initiate a formal rate hearing to consider the design of a long-term link between rates to the DSIs and rates to BPA's preference customers.

In 1985 and 1986, a formal rate hearing was conducted and an IP-PF Link was developed based on the results presented in the Final 1985 section 7(c)(2) Industrial Margin Study and the Final 1985 Wholesale Power Rate Design Study. The link methodology was first used in establishing the 1987 rates.

##### B. Development of the 1988 Link

For BPA's 1985 rate proposal, BPA developed methodologies for determining the IP rate according to the post-1985 rate directives contained in the Pacific Northwest Power Act. Section 7(c)(2) of the Pacific Northwest Power Act provides that beginning July 1, 1985, BPA's DSI rates are to be set at levels that are determined to be equitable in relation to the rates public agencies charge their industrial customers. 16 U.S.C. 839e(c)(2). The DSI rate is based on the applicable BPA wholesale rates to public agency customers and takes into account the typical margin included by these customers in their retail industrial rates. The DSI rates are also to be adjusted by a value of reserves (VOR) credit. The VOR credit accounts for the value of power system reserves provided through contractual rights which allow BPA to restrict portions of the DSI load.

In developing the 1985 rates, BPA calculated a value of reserves credit and, for the first time, a typical retail industrial margin. Two levels of the margin, the Premium and the Standard margin, were calculated. The Premium margin reflects contract service to the DSIs. It is available to a DSI that does not waive its contractual rights to first quartile service with Surplus Firm Energy Load Carrying Capability (FELCC). BPA calculated the Premium margin to be 2.82 mills per kilowatt-hour (kwh).

The Standard margin reflects a quality of service to the first quartile for which a DSI waives its contractual rights for first quartile service with Surplus FELCC; thus, service is dependent on nonfirm energy availability and provisional drafts. The Standard margin (2.28 mills per kwh) equals the Premium margin (2.82 mills per kwh) less a character of service adjustment (0.54 mills per kwh) to reflect a quality of service dependent on water conditions.

A value of reserves analysis also was prepared for the 1985 BPA rate filing. The VOR analysis quantifies the benefit resulting from BPA's contractual rights to restrict the DSI load by examining the most feasible, least-cost alternatives to providing these reserves. The value of reserves credited for the 1985 rate filing was 1.90 mills per kwh.

The IP-PF Link is a formula composed of two components: (1) The net Premium and net Standard margins; and (2) an inflation adjustment. The net Premium and net Standard margin equal the Premium and Standard margin, respectively, less the value of reserves credit. Therefore, the net Premium margin is 0.92 mills per kwh (2.82 mills per kwh less 1.90 mills per kwh). The net Standard margin is 0.38 mills per kwh (2.28 mills per kwh less 1.90 mills per kwh). For the relevant rate test period, the net margins are adjusted by an inflation factor based on the latest Gross National Product (GNP) implicit price deflators.

The link methodology also provides a statement of terms and conditions regarding adjustment clauses and quality of service. First, DSIs purchasing power under the IP and VI rate schedules will be subject to all adjustment clauses, surcharges, or credit uniformly applicable under the PF rate schedule and, if applicable, the New Resource rate schedule. Second, for the duration of the Link, BPA will continue to make available to the DSIs the qualities of service specified in section 6 of the Variable Rate Contract. Section 6 provides that the DSIs will receive Base Rate Service, which is contract service

to the first quartile, unless the customer selects Discounted Rate Service.

### C. Proceedings before BPA and FERC

On July 2, 1986, BPA published in the Federal Register a notice describing the proposed IP-PF rate link methodology and commencing a rate proceeding pursuant to section 7(i) of the Pacific Northwest Power Act. 51 FR 24,197 (1986). A hearing officer conducted the rate proceeding, providing parties an opportunity to present direct cases, rebuttal, cross-examination, and submission of briefs. Comments on BPA's proposal were received from five participants. BPA issued a draft ROD in September, 1986, and issued a ROD on March 20, 1987, based upon the record compiled by the hearing officer.

The record of the 1986 IP-PF rate link methodology was included in BPA's 1987 wholesale power and transmission rate filing submitted to the Federal Energy Regulatory Commission (FERC) for confirmation and approval on July 31, 1987. On September 29, 1987, FERC granted interim approval of the 1987 rate filing. 40 F.E.R.C. ¶61,351 (1987).

### D. Benefits of IP-PF Link

The extension of the IP-PF link methodology will continue to have several benefits. The Link meets BPA's primary objective of enhancing BPA's revenue stability, resource planning certainty, and ability to meet planned Treasury payments, by reducing the rate uncertainty perceived by the DSIs. Because it is generally supported by BPA's customer groups, the Link reduces controversy in rate cases for all customers. It is also understandable and administratively practical. Finally, the Link maintains consistency with provisions of the Pacific Northwest Power Act.

## II. Proposal

The current Link expires with the current rates. BPA is proposing to extend the use of the link methodology through rate periods commencing on or before the termination date of the VI Rate contract or September 30, 1995, whichever is later.

### A. IP-PF Rate Link

#### 1. Terms and Definitions

Section 7(c)(1)(B) of the Pacific Northwest Power Act states that rates to

BPA's direct-service industrial (DSI) customers after July 1, 1985, shall be equitable in relation to the industrial rates charged by BPA's preference customers. Section 7(c)(2) states that rates to the DSIs are to be based upon: (1) BPA's applicable wholesale power rates to its preference customers; and (2) typical margins above power and transmission costs included in the preference customers' rates to their industrial customers. The resulting rate levels are subject to the floor rate provision of section 7(c)(2), which provides for a minimum DSI rate level. Relevant terms are defined as follows:

a. *Applicable Wholesale Rate.* As provided in section 7(c)(2) of the Pacific Northwest Power Act, the BPA wholesale power rates developed for power purchases by BPA's public body and cooperative customers, adjusted for DSI load shape (time pattern of consumption).

b. *Premium Margin.* The typical margin above wholesale power costs referred to in section 7(c)(2) of the Pacific Northwest Power Act, adjusted for the size of DSI loads. As determined in the 1985 Administrator's ROD for BPA's rate adjustment proceeding, calculation of the Premium margin recognizes that, in the test year for which those rates were set, none of the service to the DSI first quartile under the IP Premium rate was dependent on the availability of nonfirm energy.

c. *Standard Margin.* The typical margin above wholesale power costs referred to in section 7(c)(2) of the Pacific Northwest Power Act, adjusted for the size of load and the character of service to the first quartile. As determined in the 1985 Administrator's ROD, calculation of the Standard margin recognizes that, in the test year for which those rates were set, service to a portion of the first DSI quartile under the IP Standard rate was dependent on the availability of nonfirm energy.

d. *Value of Reserves Credit.* The rate credit granted the DSIs for BPA's contractual rights to restrict their load under certain conditions.

e. *Net Premium Margin.* The Premium margin less the Values of Reserves Credit.

f. *Net Standard Margin.* The Standard margin less the Value of Reserves Credit.

g. *IP-PF Link.* The methodology for linking the rates for BPA's DSI

customers to the rates for BPA's public body and cooperative customers on a long-term basis.

h. *IP Premium Margin-Based Rate.* The rate level defined by the following components: the applicable wholesale rate, the premium margin, and the value of reserves credit.

i. *IP Standard Margin-Based Rate.* The rate level defined by the following components: the applicable wholesale rate, the standard margin, and the value of reserves credit.

j. *IP Premium Rate.* The rate option contained in the IP rate schedule which includes first quartile service with Surplus FELCC. The level of the IP Premium Rate contained in the IP rate schedule may not necessarily equal the level of the IP Premium margin-based rate. The IP Premium rate is subject to further adjustments, specifically any section 7(b)(2) and section 7(b)(3) adjustments, or scaling to adjust for the rate period extending beyond the test year, to determine the IP Premium rate.

k. *IP Standard Rate.* The rate option contained in the IP rate schedule which includes first quartile service with nonfirm energy and/or provisional drafts. The level of the IP Standard rate contained in the IP rate schedule may not necessarily equal the level of the IP Standard margin-based rate. The IP Standard rate is subject to the floor rate test. Further, the IP Standard margin-based rate may be subject to further adjustments, specifically, any section 7(b)(2) and/or section 7(b)(3) adjustments, or scaling to adjust for the rate period extending beyond the test year, to determine the IP Standard rate.

[Note: In BPA's 1987 rate filing, it was determined that the 7(b)(3) adjustment was zero. However, BPA has not received final approval of its 1987 rates from FERC.]

l. *Floor Rate.* The rate determined in BPA's wholesale rate case that forms the basis for computing a minimum DSI rate level that meets the requirements of section 7(c)(2) of the Pacific Northwest Power Act.

### B. Formulas

The proposed IP-PF Link incorporates the following formulas:

$$1. IP_p = AWR + [.02 \times \frac{GNP \text{ deflator (year)}}{GNP \text{ deflator (1987)}}]$$

$$2. IP_i = AWR + \{.38 \times \frac{GNP \text{ deflator (year)}}{GNP \text{ deflator (1987)}}\}$$

#### Where:

"IP<sub>i</sub>" is the IP Premium margin-based rate (mills per kilowatthour) or its successor, as determined by the Link.

"IP<sub>s</sub>" is the IP Standard margin-based rate (mills per kilowatthour) or its successor, as determined by the Link.

"AWR" is the Applicable Wholesale Rate, as referred to in section 7(c)(2) of the Pacific Northwest Power Act, to BPA's public body and cooperative customers. The AWR is the weighted average of the PF demand and energy charges in the rates charged for firm power for the combined general requirements of public body and cooperative customers (weighted by PF energy sales to the public agencies) and NR demand and energy charges in the rates charged public body and cooperative customers applicable to their new large single loads (weighted by energy sales to public agencies for resale to new large single loads) applied to the DSIs' demand and energy billing determinants as forecasted in the section 7(i) proceeding in which the Link is applied.

"92" is the Fiscal Year (FY) 1987 net Premium margin, based on 100 percent service to the first quartile, none of which is dependent on the availability of nonfirm energy, as determined in the 1985 ROD.

"38" is the FY 1987 net Standard margin, based on service to the first quartile, a portion of which is dependent on the availability of nonfirm energy, as determined in the 1985 ROD.

"GNP deflator (1987)" is the GNP deflator Index for 1987.

"GNP deflator (year)" is the GNP deflator Index for the test year in subsequent section 7(i) proceedings where the IP rates are to be determined by the Link.

#### C. Other Terms and Conditions of the IP-PF Rate Link

1. Except as required by the floor rate provision of the Pacific Northwest Power Act, the IP test year rates shall be determined in any section 7(i) proceeding to establish rates effective on or before the termination date of the VI rate contract, or September 30, 1995, whichever is later, by the formulas in paragraph B. The purpose of the formulas is to eliminate the need to recalculate during the term of the Link the value of reserves (including the VOR credit) and the "typical margin," net of

adjustments as set forth in sections 7(c)(2) (A), (B), and (C) of the Pacific Northwest Power Act. The only variables in the formulas are "AWR" and "GNP deflator (year)." That is, for each section 7(i) proceeding in which the Link is applied, "AWR" shall be calculated from the PF and NR rates as determined in that proceeding and "GNP deflator (year)" shall be the GNP Index for the test year used for all other purposes in that proceeding.

If the test year is a prospective period, then "GNP deflator (year)" will be the forecasted GNP deflator index used for all other purposes in the rate proceeding. Further, if the IP rates determined by the Link will be effective for periods other than the test year, then these rates may be scaled upward or downward to those future periods as appropriate.

2. In the event that the rates established as described in paragraph B, rather than the section 7(c)(2) floor rate, govern the applicable IP rates, then, in addition to any potential section 7(b)(3) obligations on the part of the DSIs, including surcharges arising from the "triggering" of the section 7(b)(2) rate test, the DSIs shall also be subject during the term of the Link to adjustment clauses, surcharges, or credits uniformly applicable to the PF rate schedule. Such adjustments would include the Cost Recovery Adjustment Clauses uniformly applicable to purchases under the PF and NR rate schedules. For purposes of the prior sentence, the Low Density Discount and Irrigation Discount available to some customers and any surcharge for noncompliance with model conservation standards shall not be considered "uniformly applicable."

3. For the duration of the Link, BPA will continue to make available to the DSIs power of the quality to which the DSIs are entitled under their Power Sales Contracts with BPA, at the rates established as described in paragraphs B.1.a and C.1. BPA will also make available to the DSIs, on an optional basis, service, the qualities of which shall be specified by the Variable Rate Contract and which shall remain unchanged while the contract is in force throughout the duration of the Link, at the rates established as described in paragraphs B.1.b and C.1.

#### III. Relevant Statutory Provisions

Rates for the DSIs are to be set according to provisions contained in section 7(c) of the Pacific Northwest Power Act, 16 U.S.C. 839e(c). Section 7(c)(2) of the Pacific Northwest Power Act provides that, beginning July 1, 1985, rates that apply to DSI customers:

\*\*\* shall be based upon the Administrator's applicable wholesale rates to \*\*\* public body and cooperative customers and the typical margins included by such public body and cooperative customers in the retail rates \*\*\*

Section 7(c)(2) further provides that the rate determination must take into account:

\*\*\* (a) the comparative size and character of the loads served; (b) the relative costs of electric capacity, energy, transmission, and related delivery facilities provided and other service provisions; and (c) direct and indirect overhead costs, all as related to the delivery of power to industrial customers \*\*\*

Section 7(c)(2) also provides that DSI rates:

\*\*\* shall in no event be less than the rate in effect for the contract year ending on June 30, 1985.

Section 7(c)(3) provides that DSI rates must be adjusted:

\*\*\* to take into account the value of power system reserves made available to the Administrator through his rights to interrupt or curtail service to such direct service industrial customers.

#### IV. Procedures Governing Rate Adjustments and Public Participation

##### A. Expedited Rate Procedures

Section 7(i) of the Pacific Northwest Power Act, 16 U.S.C. 839e(i), requires that rates be set according to certain procedures. These procedures include: Issuance of a Federal Register notice announcing the proposed rates; one or more hearings; the opportunity to submit written views, supporting information, questions, and arguments; and a decision by the Administrator based on the record developed during the hearing process. This proceeding will be governed by BPA's "Procedures Governing Bonneville Power Administration Rate Hearings," 51 FR 7611 (March 5, 1986) which implement, and in most instances expand, these statutory requirements.

Pursuant to Rule 1010.3(c) of the Procedures Governing Bonneville Power Administration Rate Hearings (BPA Procedures), this hearing will be conducted under Rule 1010.10, which governs Expedited Rate Proceedings. The expedited procedures will be used rather than the procedures for General Rate Proceedings conducted under Rule 1010.9. The procedures for General Rate Proceedings are intended for use when the Administrator proposes to revise all, or substantially all, of BPA's wholesale power and transmission rates. The proposed extension of the link methodology deals with one rate design measure; therefore, the issues in this rate proceeding will be fewer and of more limited scope than the issues in a proceeding to adjust BPA rates. BPA believes that the 90-day Expedited Rate Proceeding will be adequate to develop a full and complete record and to receive public comment and argument related to the proposed methodology. If more time is required, the Hearing Officer may request, under § 1010.10(b) of the BPA Procedures, that the BPA Administrator grant an extension.

#### *B. Distinguishing Between "Participants" and "Parties"*

BPA distinguishes between "participants in" and "parties to" the hearings. Apart from the formal hearing process, BPA will receive comments, views, opinions, and information from "participants," who are defined in the BPA Procedures as persons who may submit comments without being subject to the duties of, or having the privileges of, parties. Participants' written and oral comments will be made part of the official record and considered by the Administrator. Participants are not entitled to participate in the prehearing conference; may not cross examine parties' witnesses, seek discovery, or serve or be served with documents; and are not subject to the same procedural requirements as parties.

Written comments by participants will be included in the record if they are submitted on or before September 7, 1990. Participants' written views, supporting information, questions, and arguments should be submitted to BPA's Public Involvement Office.

The second category of interest is that of a "party" as defined in §§ 1010.2 and 1010.4 of the BPA Procedures. Parties may participate in any aspect of the hearing process.

#### *C. Petitions for Intervention*

Persons wishing to become a party to BPA's rate proceeding must notify BPA in writing of their request. Petitioners may designate no more than two

representatives upon whom service of documents will be made. Petitions to intervene shall state the name and address of the person requesting party status and the person's interest in the hearing. Petitioners must explain their interests in sufficient detail to permit the Hearing Officer to determine whether they have a relevant interest in the hearing. Pursuant to Rule 1010.1(d) of BPA's Procedures, BPA waives the requirement in Rule 1010.4(d) that any opposition to an intervention petition be filed and served 24 hours before the prehearing conference. Any opposition to an intervention petition may instead be made at the prehearing conference. Any party, including BPA, may oppose a petition for intervention. Persons who have been denied party status in any past BPA rate proceeding shall continue to be denied party status unless they establish a significant change of circumstances. All timely applications will be ruled on by the Hearing Officer. Late interventions are strongly disfavored. Opposition to an untimely petition to intervene shall be filed and received by BPA within 2 days after service of the petition. Intervention petitions will be available for inspection in BPA's Public Information Center, 1st floor, 905 NE. 11th, Portland, Oregon.

Persons seeking to become parties may wish to obtain copies of BPA's testimony prior to the prehearing conference. The testimony will be available July 19, 1990.

To request the testimony by telephone, call BPA's toll-free document request line: 800-841-5867 for Oregon outside of Portland; 800-624-9495 for Washington, Idaho, Montana, California, Wyoming, Utah, and Nevada. You will reach a recorded message where you can leave your request for the testimony. Other callers should use 503-230-3478.

#### *D. Developing the Record*

Cross-examination will be scheduled by the Hearing Officer as necessary, following completion of the filing of all parties' and BPA's direct cases, rebuttal testimony, and discovery. Parties will have the opportunity to file initial briefs at the close of cross-examination.

After the close of the hearings, and following submission of initial briefs, BPA will file a draft ROD which will identify the issues BPA will resolve in the hearing, summarize the factual, legal, and policy arguments presented by BPA and the parties on each issue, and state the Administrator's tentative decision. Parties may file briefs on exceptions, or when all parties have previously agreed, oral argument may be substituted for briefs on exceptions.

When oral argument has been scheduled in lieu of briefs on exceptions, the argument will be transcribed and made part of the record.

The record will include, among other things, the transcripts of any hearings, written material submitted by the participants, and evidence accepted into the record by the Hearing Officer. The Hearing Officer then will review the record, supplement it if necessary, and certify the record to the Administrator for decision.

The basis for the final rate will be expressed in the Administrator's ROD. The Administrator will serve copies of the ROD on all parties and will file the final proposed methodology, together with the record, with FERC for confirmation and approval.

#### *V. Scope*

The methodology extended in this rate proceeding will be used in future general rate proceedings, as it has for the last two rate proceedings, to determine the IP Standard margin-based rate and the IP Premium margin-based rate. The IP margin-based Premium and Standard rates resulting from the IP-PF rate link methodology would be subject to the floor rate test described in section 7(c)(2) of the Pacific Northwest Power Act. 16 U.S.C. 839e(c)(2). The IP-PF rate link, however, does not incorporate treatment of any charges or payments that may result from implementation of section 7(b)(2) or 7(b)(3) of the Pacific Northwest Power Act. 16 U.S.C. 839e(b)(2) and 839e(b)(3).

Issues addressed in other BPA proceedings are not at issue in this rate link proceeding. Issues relating to the VI rate will be addressed in a separate process. Issues relating to other BPA processes, such as Surplus Power Marketing and System Operations Review, are beyond the scope of this rate link proceeding.

Issued in Portland, Oregon, on July 3, 1990.

James J. Jura,  
Administrator.

[FR Doc. 90-16933 Filed 7-18-90; 8:45 am]

BILLING CODE 6450-01-M

#### **Energy Information Administration**

##### **Agency Information Collections Under Review by the Office of Management and Budget**

**AGENCY:** Energy Information Administration, DOE.

**ACTION:** Notice of requests submitted for review by the Office of Management and Budget.

**SUMMARY:** The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (Pub. L. 96-511, 44 U.S.C. 3501 *et seq.*) The listing does not include a collection of information contained in a new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) Collection number(s); (3) Current OMB docket number (if applicable); (4) Collection title; (5) Type of request, e.g., new, revision, extension, or reinstatement; (6) Frequency of collection; (7) Response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) Affected public; (9) An estimate of the number of respondents per report period; (10) An estimate of the number of responses annually; (11) An estimate of the average hours per response; (12) The estimated total annual respondent burden; and (13) A brief abstract describing the proposed collection and the respondents.

**DATES:** Comments must be filed on or before August 20, 1990. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395-3084. (Also, please notify the EIA contact listed below.)

**ADDRESSES:** Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards at the address below.)

**FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT:** Jay Casselberry, Office of Statistical Standards (EI-73), Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Mr. Casselberry may be telephoned at (202) 586-2171.

**SUPPLEMENTARY INFORMATION:** The energy information collections submitted to OMB for review were:

1. Federal Energy Regulatory Commission
2. FERC-567
3. 1902-0005
4. Annual Reports of Systems Flow Diagrams and System Capacity
5. Extension
6. Annually
7. Mandatory
8. Businesses or other for profit
9. 101 respondents
10. 138 responses
11. 85.12 hours per response
12. 11,747 hours
13. The Commission uses the FER-567 to process rate and certificate applications; to analyze transportation and depreciation of property costs; to analyze impacts of market expansions of new facilities; to review and establish rates of depreciation for the facilities used in the production and transportation of natural gas; and to establish and enforce curtailment rules.

1. Federal Energy Regulatory Commission
2. FERC-423
3. 1902-0024
4. Cost and Quality of Fuels For Electric Plants
5. Extension
6. Monthly
7. Mandatory
8. State or local governments, Business or other for profit, Federal agencies or employees, Non-profit institutions
9. 750 respondents
10. 9,000 responses
11. 2.00 hours per response
12. 18,000 hours
13. This form is used to gather information on the cost and quality of fuels delivered to electric power plants. The responses are used to evaluate individual utility costs and fuel buying practices in rate cases, and in the required public reviews to insure efficient use of power production facilities and cogeneration plants under the Commission's Qualifying Facilities Program.

Authority: Sec. 5(a), 5(b), 13(b), and 52, Pub. L. 93-275, Federal Energy Administration Act of 1974, 15 U.S.C. §§ 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC, July 16, 1990.

Yvonne Bishop,  
Director, Statistical Standards, Energy Information Administration.

[FR Doc. 90-16935 Filed 7-18-90; 8:45 am]

BILLING CODE 6450-01-M

## Office of Fossil Energy

[FE Docket Nos. 89-84-NG and 89-83-LNG]

### Louis Dreyfus Energy Corp.; Order Granting Blanket Authorization To Import Natural Gas and Liquefied Natural Gas

**AGENCY:** Office of Fossil Energy, DOE.

**ACTION:** Notice of order granting blanket authorization to import natural gas and liquefied natural gas.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy gives notice that it has issued an order granting Louis Dreyfus Energy Corp. (L.D. Energy) blanket authorization to import up to 50 Bcf of natural gas from Canada and up to 250 Bcf of liquefied natural gas (LNG) from overseas producers and suppliers over a two-year term beginning on the date of first delivery of either natural gas or LNG. The natural gas or LNG may be imported at any point on the international border where existing pipeline or LNG facilities are located. The order consolidated two blanket import applications filed by L.D. Energy in FE Docket Nos. 89-84-NG and 89-83-LNG.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, July 13, 1990.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 90-16932 Filed 7-18-90; 8:45 am]

BILLING CODE 6450-01-M

## Federal Energy Regulatory Commission

[Docket No. ER90-184-001]

### Order Clarifying Prior Order and Denying Request for Rehearing, Ford Motor Co. and Rouge Steel Co.

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

Issued July 11, 1990.

On April 27, 1990, Ford Motor Company (Ford) and Rouge Steel Company (Rouge) (collectively Industrials) filed a motion for clarification or, in the alternative, a request for rehearing of the

Commission's order issued in this proceeding on March 29, 1990 (March 29 order).<sup>1</sup> The March 29 order granted waivers and blanket approvals under various parts of the Commission's regulations, consistent with *St. Joe Minerals Corporation*<sup>2</sup> and *Cliffs Electric Service Company*, et al.<sup>3</sup> On April 27, 1990, the Industrials also filed a motion requesting prompt Commission action on their motion for clarification or alternative request for rehearing.

The Industrials request that the Commission clarify that: (1) No corporate subsidiary or affiliate of the Industrials is subject to Commission jurisdiction or the directives of the March 29 order by virtue of its corporate relationship with the Industrials; (2) transaction between Ford and Rouge which reallocate ownership interests would not constitute dispositions of jurisdictional facilities under section 203 of the Federal Power Act (FPA) (or alternatively, grant blanket approval of all such transactions between the Industrials); (3) the part 33 requirement for approval of acquisitions of public utility securities is waived for the Industrials (or alternatively, grant blanket approval for such acquisitions); (4) the Industrials' officers and directors are not subject to the part 46 interlock reporting requirements (at least until the 1991 annual filing is required), and that the timing for the part 45 interlock approval filings for the Industrials' present officers and directors be clarified; and (5) the part 35.15 notice of termination requirement is waived.

#### Discussion

The Industrials request that we confirm that their subsidiaries and affiliates are not subject to the March 29 order by virtue of their corporate relationship with the Industrials and are not obliged to comply with the directives issued to the Industrials in the March 29 order. Given our findings in our March 29 order,<sup>4</sup> we will grant the Industrials' request, but only to the extent that these subsidiaries and affiliates are not otherwise subject to our authority.

The Industrials request that we find that the possible reallocations of ownership interests between Ford and Rouge, as contemplated by the Operating Agreement,<sup>5</sup> are not

"dispositions" of jurisdictional property triggering the requirements of Ordering Paragraph (C) of the March 29 order. We cannot grant the Industrials' request with regard to these potential "dispositions" because of our statutory responsibility under section 203 of the FPA.<sup>6</sup> A reallocation of ownership interests can constitute a jurisdictional disposition.<sup>7</sup> However, the Commission has emphasized that, under section 203 of the FPA, the Commission's concern is with the transfer of control over jurisdictional facilities.<sup>8</sup> We are, therefore, favorably disposed to the Industrials' alternative request—which involves only reallocations of ownership interests between Ford and Rouge. Given the circumstances here, *i.e.*, that both Ford and Rouge are not primarily engaged in the public utility business, we will grant blanket approval to reallocations of ownership interest under the Operating Agreement to the extent that transfers of ownership interests between Ford and Rouge are not part of a corporate reorganization of either company, or a transaction where a controlling interest in either company or in the facility is transferred to a different entity.

The Industrials request that we waive our part 33 requirement concerning approval of acquisitions of public utility securities to permit the Industrials and their subsidiaries and affiliates to acquire public utility securities. In light of our interpretation of the March 29 order, *supra*, that we will not assert jurisdiction over the activities of subsidiaries or affiliates of the Industrials, we find that the investment by these entities in the securities of public utilities is not an activity within the scope of the Commission's authority.<sup>9</sup> However, under section 203

of the FPA, if either of the Industrials, as jurisdictional public utilities, desire to make such investments they would be required to seek prior Commission approval. We believe, however, that a conditional authorization is appropriate here. The acquisition of securities of public utilities is of concern to this Commission if the purchase is made in order to control the public utilities. It is our understanding that both Ford and Rouge, while jurisdictional public utilities, are not primarily engaged in the public utility business and are not primarily engaged in the business of purchasing the securities of other companies (including public utilities). We believe, however, that both Ford and Rouge must, at a minimum, report these investments so that the Commission can determine whether control over a public utility would result. In order to assure that we have adequate notice of the nature and extent of either Ford's or Rouge's holdings of public utility securities, we will require that Ford and Rouge file an annual report of such transactions, on April 30 of each year for the preceding calendar year, which describes these investments.<sup>10</sup> Under the circumstances of this case, such a reporting requirement will provide a sufficient safeguard to the public.

The Industrials have requested that the Commission waive the requirements of part 46 of the regulations. According to the Industrials, "imposing part 46 requirements on the officers and directors of Ford and Rouge would not further the public interest, given that the companies are only nominally 'public utilities'." \* \* \*<sup>11</sup> We find that the Industrials argument is not relevant because the annual reporting requirement is statutory in nature,<sup>12</sup> and this Commission has no authority to waive statutory requirements. However, the Industrials' alternative request for an initial filing deadline of April 30, 1991 (to file reports for calendar year 1990) to commence submitting annual reports comports with the statute. No reports for calendar year 1989 will be necessary.

The Industrials have requested guidance as to when, if at all, Ford and Rouge officers and directors who assumed their positions prior to the issuance of the order must file sworn statements as described in ordering

<sup>1</sup> Ford Motor Company and Rouge Steel Company, 50 FERC ¶ 61,426 (1990).

<sup>2</sup> 21 FERC ¶ 61,323 (1982), *order on reh'g* 22 FERC ¶ 61,211 (1983); *see also* *St. Joe Minerals Corporation*, 23 FERC ¶ 61,208 (1983).

<sup>3</sup> 32 FERC ¶ 61,372 (1985).

<sup>4</sup> *See* 50 FERC at 63,307-08.

<sup>5</sup> The Operating Agreement provides in pertinent part:

#### 4. Operation and Financial Responsibilities \* \* \*

D. *Capital Projection Allocation*—Ford shall allocate capital expenditure projects approved by the Joint Policy Committee to the parties in proportion to their ownership share of the Facilities. In unusual circumstances, if any capital project is not approved by either party, or the parties do not agree to allocate expenditures in proportion to their ownership share of the Facilities, either party may sponsor the project and provide disproportionate funding, provided that said project will not adversely affect the provision of Services otherwise required hereunder. Should such disproportionate sponsorship occur, Ford and Rouge Steel shall mutually agree to reallocate their undivided ownership interests in the Facilities to reflect such disproportionate expenditures for the purpose of calculating each party's share of capital carrying costs to be allocated in respect of all of the Services provided hereunder \* \* \*

<sup>6</sup> 16 U.S.C. 824b (1988).

<sup>7</sup> *See generally* *Central Vermont Public Service Corporation*, 39 FERC ¶ 61,295 (1987).

<sup>8</sup> *See, e.g.*, *Central Illinois Public Service Company*, 42 FERC ¶ 61,073 at 61,328 (1988).

<sup>9</sup> *See* 18 CFR 33.1(a) (1989).

<sup>10</sup> The annual report should identify for each purchase or sale or other transaction: The public utility, the types of securities purchased or sold, the amount of securities purchased or sold, and when the purchase or sale occurred. The annual report should also identify the calendar year-end holdings.

<sup>11</sup> Industrials' Motion for Clarification at 7.

<sup>12</sup> 16 U.S.C. 825d(c) (1988).

Paragraph (H) of the March 29 order. We believe that these officers and directors are covered by Ordering Paragraph (G) and (H) of the March 29 order and the Industrials have not given sufficient reason to exclude them from the truncated part 45 filing requirements which were ordered. However, we believe that the Industrials have provided adequate reason<sup>13</sup> to waive the time limit for filing the applications and to extend the time for filing to 90 days after the issuance of this order.

Finally, the Industrials request that the Commission waive § 35.15 of the regulations, governing rate schedule cancellation or termination.<sup>14</sup> According to the Industrials, such a waiver would be appropriate because the power sales are *de minimis* with respect to the sole customer's, Detroit Edison Company's, total sales. We will not waive § 35.15. This section is necessary to ensure that utilities inform the Commission when rate schedules are cancelled or terminated, not only to ensure that the Commission's rate schedule filed are complete and current,<sup>15</sup> but also so that the Commission has an opportunity to review the cancellation or termination to ensure that it is just and reasonable.<sup>16</sup>

#### The Commission orders:

(A) The March 29 order is hereby clarified as discussed in the body of this order, and the Industrials' alternative request for rehearing is hereby denied as discussed in the body of this order.

(B) Within thirty (30) days of the date of this order, any person desiring to be heard or to protest blanket approval of the reallocation of ownership interests by Ford and Rouge, as discussed in the body of this order, should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 388.214).

(C) Absent a request for hearing within the period specified in Ordering

Paragraph (B) above, Ford and Rouge are authorized from the date of this order to reallocate ownership interests; provided that such reallocation is for some lawful object, within the corporate purposes of the applicant, and compatible with the public interest, and is reasonable necessary or appropriate for such purposes.

(D) The Commission reserves the right to modify this order and to require a further showing that neither public nor private interests will be adversely affected by the continued Commission approval of Ford's and Rouge's reallocation of ownership interests.

(E) Ford and Rouge each shall file an annual report on April 30 of each year, as described in the body of this order identifying any investments in public utility securities.

(F) The officers and directors of both Ford and Rouge shall file appropriate part 46 reports on or before April 30, 1991 and each year thereafter, as discussed in the body of this order.

(G) The officers and directors of both Ford and Rouge shall file appropriate part 45 filings within 90 days of the date of this order, as discussed in the body of this order.

(H) The Industrials' request for waiver of § 35.15 of the Commission's regulations (18 CFR 35.15) is hereby denied.

(I) The Secretary shall promptly publish this order in the Federal Register.

By the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 90-16821 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-01-M

#### [Docket No. PR90-10-000]

#### Llano, Inc.; Petition for Rate Approval

July 12, 1990.

Take notice that on July 3, 1990, Llano, Inc. filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable maximum firm rates of \$6.1304 per maximum daily quantity and \$0.0703 per MMBtu and a maximum interruptible rate of \$0.2718 per MMBtu for transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978. Llano also requests approval of section 311 storage rates which include for firm service, a demand charge of \$3.5218 per maximum daily withdrawal quantity, a capacity charge of \$0.3522 per maximum storage quantity divided by 12 and an injection charge of \$0.1463 per MMBtu injected

and for interruptible service, a holding charge of \$0.1180 times monthly balance and an injection charge of \$0.1463 per MMBtu injected.

Llano's petition states that it is an intrastate pipeline within the meaning of section 2(16) of the NGPA and operates solely within the state of New Mexico. Llano's current maximum interruptible transportation and storage rates were approved by the Commission December 20, 1988 in Docket No. ST88-2205.

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments. Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before August 2, 1990. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-16816 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-01-M

#### [Docket No. PR90-8-000]

#### Magnolia Pipeline Co.; Petition for Rate Approval

July 12, 1990.

Take notice that on June 29, 1990, Magnolia Pipeline Corporation filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a maximum rate of 15.86 cents per Dt plus 1% for fuel reimbursement for firm and interruptible transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978.

Magnolia's petition states that it is an intrastate pipeline in Alabama within the meaning of section 2(16) of the NGPA. It owns two discrete pipeline systems, the Oak Grove System and the newly constructed Billingsley System. The proposed section 311(a)(2) transportation will be rendered on the Billingsley System which consists of 80 miles of 24-inch pipeline and 16 miles of

<sup>13</sup> The regulations provide for filing within 30 days after election or appointment. 18 CFR 45.3(b) (1989). Our earlier order in this proceeding was issued on March 29, 1990. The Industrials note that any incumbent officers and directors are therefore not able to comply with this 30-day requirement. In addition, according to the Industrials, Rouge's board of directors was elected on March 30, 1990; Ford may have similarly affected, i.e., recently elected or appointed officials. Moreover, additional time is needed to obtain information and to identify other possible interlocks, especially in light of the size and complexity of their activities. See Industrials' Motion for Clarification at 8 n.4.

<sup>14</sup> See 18 CFR 35.15 (1989).

<sup>15</sup> See Orange and Rockland Utilities, Inc., 42 FERC ¶ 61,012 (1988); 16 U.S.C. 824(c) (1988).

<sup>16</sup> 16 U.S.C. 824(d)(a), 824(e)(a) (1988).

16-inch pipeline and associated compression facilities originating in Tuscaloosa and Hale Counties, Alabama and terminating at an interconnection with Transcontinental Gas Pipeline Corporation in Chilton County, Alabama.

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments. Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before August 2, 1990. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 90-16817 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. PR90-9-000]

#### TPC Transmission, Inc.; Petition for Rate Approval

July 12, 1990.

Take notice that on July 2, 1990, TPC Transmission, Inc. filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a maximum rate of 5.52 cents per MMBtu for transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978.

TPC Transmission's petition states that it is a Hinshaw Pipeline in Texas and is authorized to perform part 284 activities pursuant to its § 284.224 blanket certificate granted to it by the Commission in CP89-2057-000. TPC Transmission states that it will render this transportation service on its Stratton Ridge Pipeline which extends from the tailgate of a separation and dehydration facility located near Surfside, Texas to interconnections with Dow Pipeline Company and Amoco Gas Corporation.

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not

in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments. Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before August 2, 1990. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-16818 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-9-16-000]

#### National Fuel Gas Supply Corp.; Proposed Changes in FERC Gas Tariff

July 12, 1990.

Take notice that on July 10, 1990, National Fuel Gas Supply Corporation ("National") tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to be effective August 1, 1990.

Third Revised Sheet No. 71.1

Second Revised Sheet No. 71.2

Second Revised Sheet Nos. 71-A.1 through 71-A.2

Third Revised Sheet No. 71-B.1

Fifth Revised Sheet No. 71-D

Third Revised Sheet Nos. 72.1 through 72.3

Second Revised Sheet No. 72.4

Second Revised Sheet Nos. 72-A-1 through 72-A-7

Third Revised Sheet Nos. 72-B.1 through 72-B.4

Second Revised Sheet Nos. 72-B.5 through 72-B.7

Sixth Revised Sheet No. 72-D

Original Sheet No. 72-D.1

National states that the purpose of this filing is to update the amount of take-or-pay charges approved by the Federal Energy Regulatory Commission ("Commission") to be billed to National by its pipeline-suppliers and to be recovered by National by operation of section 20 of the General Terms and Conditions to National's FERC Gas Tariff, First Revised Volume No. 1. National further states that its pipeline-suppliers which have received approval to bill take-or-pay charges to National are: Columbia Gas Transmission Corporation, CNG Transmission Corporation, Texas Eastern Transmission Corporation,

Transcontinental Gas Pipe Line Corporation, and Tennessee Gas Pipeline Company.

National states that copies of National's filing were served on National's jurisdictional customers and on the interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street N.E., Washington, DC 20426, in accordance with Rules 214 or 211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before July 19, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-16819 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-190-003]

#### Northwest Pipeline Corp.; Proposed Change in FERC Gas Tariff

July 12, 1990.

Take notice that on July 10, 1990, Northwest Pipeline Corporation ("Northwest") tendered for filing and acceptance Second Substitute Third Revised Sheet No. 31 to become a part of its FERC Gas Tariff, First Revised Volume No. 1.

Northwest states that the purpose of this filing is to restate the availability provision for Rate Schedule SGS-1 storage service in compliance with the Federal Energy Regulatory Commission ("Commission") letter order issued July 2, 1990 in the above docket. The existing availability provision is revised to provide that Rate Schedule SGS-1 storage service shall be available only to those existing customers who have contracted for Rate Schedule SGS-1 storage service, and which have received authorization under section 7(c) of the Natural Gas Act to receive service thereunder.

Northwest requests waiver of the Commission's regulations to permit Second Substitute Third Revised Sheet No. 31 to become effective February 1, 1989. Northwest states that a copy of this filing is being mailed to all

jurisdictional customers and affected state commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before July 19, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-16620 Filed 7-18-90; 8:45 am]

BILLING CODE 6717-17-M

## ENVIRONMENTAL PROTECTION AGENCY

[OPTS-44556; FRL 3775-2]

### TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

**SUMMARY:** This notice announces the receipt of test data on tributyl phosphate (TBP) (CAS No. 126-73-8), submitted pursuant to a final test rule. Data was also received on methyl tert-butyl ether (MTBE) (CAS No. 1634-04-4), submitted pursuant to a testing consent order under the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

#### FOR FURTHER INFORMATION CONTACT:

Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543B, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

**SUPPLEMENTARY INFORMATION:** Section 4(d) of TSCA requires EPA to publish a notice in the Federal Register reporting the receipt of test data submitted pursuant to test rules promulgated under section 4(a) within 15 days after it is received. Under 40 CFR 790.60, all TSCA section 4 consent orders must contain a statement that results of testing conducted pursuant to these testing consent orders will be announced to the public in accordance with section 4(d).

## I. Test Data Submissions

Test data for TBP were submitted by the Tributyl Phosphate Task Force on behalf of the test sponsors and pursuant to a test rule at 40 CFR 799.4360. They were received by EPA on June 26, 1990. The submissions describe an acute toxicity test for *Selenastrum capricornutum*; and acute flow-through toxicity tests for *Daphnia magna*; Gammarid, *Hyalella azteca*; and rainbow trout, *Oncorhynchus mykiss*. These tests are required by this test rule. This chemical is used in aircraft hydraulic fluids, for extraction and separation processes in the Plutonium Uranium Reduction Extraction process, as a deformer in the paper industry, in textile sizings, inks and laquers, and as a plasticizer.

Test data for MTBE were submitted by the MTBE Health Effects Testing Task Force on behalf of the test sponsors and pursuant to a consent order at 40 CFR 799.5000. It was received by EPA on July 2, 1990. The submissions describe the pharmacokinetics testing of MTBE and tert-butyl alcohol (TBA) in male and female rats by IV, oral, dermal and inhalation routes, and the mass balance of radioactivity and metabolism of MTBE and TBA in male and female rats after IV, oral, dermal and inhalation exposure to <sup>14</sup>C MTBE. Health effects testing is required by this consent order. This chemical is used almost exclusively as a blending component in high octane gasoline.

EPA has initiated its review and evaluation process for these data submissions. At this time, the Agency is unable to provide any determination as to the completeness of the submissions.

## II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPTS-44556). This record includes copies of all studies reported in this notice. The record is available for inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Public Docket Office, Rm. NE-G004, 401 M St., SW., Washington, DC 20460.

Authority: 15 U.S.C. 2603.

Dated: July 11, 1990.

Charles M. Auer,

Director, Existing Chemical Assessment Division, Office of Toxic Substances.

[FR Doc. 90-16904 Filed 7-18-90; 8:45 am]

BILLING CODE 6560-50-F

## FEDERAL COMMUNICATIONS COMMISSION

### Executive Resources and Performance Review Board; Appointment of Members

As required by the Civil Service Reform Act of 1978 (Pub. L. 95-454), Chairman Alfred C. Sikes appointed the following executives to the Executive Resources and Performance Review Board:

Andrew S. Fishel  
Thomas P. Stanley  
Richard C. Firestone  
Robert L. Pettit  
Roy J. Stewart  
Ralph Haller.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90-16810 Filed 7-18-90; 8:45 am]

BILLING CODE 6712-01-M

## FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-871-DR]

### Amendment to Notice of a Major Disaster Declaration; Illinois

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of Illinois (FEMA-871-DR), dated June 22, 1990, and related determinations.

DATED: July 11, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3614.

**NOTICE:** The notice of a major disaster for the State of Illinois, dated June 22, 1990, is hereby amended to add Public Assistance and include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 22, 1990:

The counties of Adams, Douglas, Hancock, Henderson, Macon, Menard, Mercer, McDonough, Moultrie, Putnam, Schuyler, Whiteside, and Woodford for Individual Assistance and Public Assistance; and

The counties of Jasper, Marion, Shelby, Wabash, Wayne, and White for Public Assistance (already designated for Individual Assistance).

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

*Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.*

[FR Doc. 90-16909 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-02-M

#### [FEMA-871-DR]

#### Amendment to Notice of a Major Disaster Declaration; Illinois

**AGENCY:** Federal Emergency Management Agency.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of Illinois (FEMA-871-DR), dated June 22, 1990, and related determinations.

**DATED:** July 10, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3614.

**NOTICE:** The notice of a major disaster for the State of Illinois, dated June 22, 1990, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 22, 1990:

Rock Island County for Individual Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

*Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.*

[FR Doc. 90-16910 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-02-M

#### [FEMA-868-DR]

#### Amendment to Notice of a Major Disaster Declaration; Iowa

**AGENCY:** Federal Emergency Management Agency.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of Iowa (FEMA-868-DR), dated May 26, 1990, and related determinations.

**DATED:** July 11, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3614.

**NOTICE:** The notice of a major disaster for the State of Iowa, dated May 26,

1990, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 26, 1990:

Webster County for Public Assistance. (Previously designated for Individual Assistance.)

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

*Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.*

[FR Doc. 90-16908 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-02-M

#### [FEMA-873-DR]

#### Amendment to Notice of a Major Disaster Declaration; Nebraska

**AGENCY:** Federal Emergency Management Agency.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of Nebraska (FEMA-873-DR), dated July 4, 1990, and related determinations.

**DATED:** July 11, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3614.

**NOTICE:** The notice of a major disaster for the State of Nebraska dated July 4, 1990, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 4, 1990.

Hall County for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

*Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.*

[FR Doc. 90-16911 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-02-M

#### [FEMA-863-DR]

#### Amendment to Notice of a Major Disaster Declaration; Texas

**AGENCY:** Federal Emergency Management Agency.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of

Texas (FEMA-863-DR), dated May 2, 1990, and related determinations.

**DATED:** July 11, 1990.

#### FOR FURTHER INFORMATION CONTACT:

Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3614.

**NOTICE:** The notice of a major disaster for the State of Texas, dated May 2, 1990, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 2, 1990:

The counties of Foard, Knox, and Maverick for Individual Assistance and Public Assistance; and

Bowie County for Public Assistance (already designated for Individual Assistance).

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

*Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.*

[FR Doc. 90-16912 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-02-M

#### [Docket No.: FEMA-REP-4-AL-2]

#### The Alabama Radiological Emergency Response Plans Site Specific to the Browns Ferry Nuclear Power Plant

**ACTION:** Certification of FEMA Finding and Determination.

In accordance with the Federal Emergency Management Agency (FEMA) Rule 44 CFR part 350, the State of Alabama originally submitted its offsite radiological emergency response plans relating to the Browns Ferry Nuclear Power Plant to the Regional Director of FEMA Region IV on August 30, 1982, for FEMA review and approval. On May 9, 1983, the Regional Director forwarded his evaluation and recommendation to the Associate Director for State and Local Programs and Support in accordance with § 350.11 of the FEMA Rule. Subsequent to the Region's original evaluation, several planning issues were raised and FEMA requested that the State of Alabama revise the offsite plans to address the issues. The State submitted an entirely new plan to FEMA Region IV for review and approval on February 10, 1989. The Regional Director forwarded his final evaluation and recommendation to FEMA Headquarters on August 18, 1989. Included in this evaluation was a review of the full-participation exercise

conducted on November 4, 1987, in accordance with § 350.9 of the FEMA Rule, and a report of the public meeting held on September 8, 1981, in accordance with § 350.10 of the FEMA Rule.

Based on the evaluation and recommendation by the FEMA Region IV Director and the review by the FEMA Headquarters staff, in accordance with § 350.12 of the FEMA Rule, I find and determine that, subject to the condition stated below, the State and local plans and preparedness for the Browns Ferry Nuclear Power Plant are adequate to protect the health and safety of the public living in the vicinity of the plant. The offsite plans and preparedness are assessed as adequate in that there is reasonable assurance that appropriate protective measures can be taken offsite in the event of a radiological emergency and that the plans are capable of being implemented. This approval, however, is conditional upon FEMA's verification of the adequacy of the alert and notification system, now installed and operational, in accordance with the criteria of NUREG-0654/FEMA-REP-1, Rev. 1, appendix 3; and FEMA REP-10, the "Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants".

FEMA will continue to review the status of offsite plans and preparedness associated with the Browns Ferry Nuclear Power Plant in accordance with § 350.13 of the FEMA Rule.

For further details with respect to this action, refer to Docket File FEMA-REP-4-AL-2 maintained by the Regional Director, FEMA Regions IV, 1371 Peachtree Street, NE., Atlanta, Georgia 30309.

Dated: July 6, 1990.

For the Federal Emergency Management Agency.

Grant C. Peterson,

Associate Director, State and Local Programs and Support.

[FR Doc. 90-16913 Filed 7-18-90; 8:45 am]

BILLING CODE 6718-02-M

## FEDERAL MARITIME COMMISSION

### Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime

Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200388.

Title: Maryland Port Administration/Jugolinija-Rijeka Terminal Agreement.

Parties:

Maryland Port Administration (MPA), Jugolinija-Rijeka (Jugolinija).

Synopsis: The Agreement provides for Jugolinija's 5-year lease of ten acres at Dundalk Marine Terminal to receive, ship, and store containers and related cargoes. Jugolinija guarantees MPA a minimum of 4,000 loaded containers through the Dundalk Marine Terminal in the first lease year of this Agreement, which will increase by 500 loaded containers each additional lease year.

Agreement No.: 224-200078-007.

Title: Maryland Port Administration/Clark Maryland Terminals, Inc. Terminal Agreement.

Parties:

Maryland Port Administration (MPA), Clark Maryland Terminals, Inc. (CMTI).

Synopsis: The Agreement amends the basic agreement to reduce acreage leased to CMTI in Areas 503 and 504 (Parcel B) at MPA's Dundalk Marine Terminal. The 12% discount of the tariff rates for acreage rentals is increased to 50%.

By order of the Federal Maritime Commission.

Dated: July 13, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90-16833 Filed 7-18-90; 8:45 am]

BILLING CODE 6730-01-M

### Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for

comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200387.

Title: Virginia International Terminals, Inc./Yangming Marine Line Terminal Agreement.

Parties:

Virginia International Terminals, Inc. (VIT)

Yangming Marine Line (YML).

Synopsis: The Agreement provides for: (1) YML's non-exclusive use of VIT's terminal facilities and services at Norfolk International Terminal, Norfolk, VA (NIT); (2) the rates and charges of Terminal Tariff No. 2, as amended, issued by Terminal Operators Conference of Hampton Roads to apply to YML, except for certain incentive rates; (3) YML to guarantee VIT a minimum of 80,000 tons through NIT for the Agreement year; and, (4) YML's rights to the incentive rates to be terminated if YML fails to move the minimum 80,000 tons through NIT for the Agreement year.

By Order of the Federal Maritime Commission.

Dated: July 13, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90-16834 Filed 7-18-90; 8:45 am]

BILLING CODE 6730-01-M

### Request for Additional Information

Agreement No.: 203-011281.

Title: REEFSEA Discussion Agreement.

Parties:

Reefer Express Lines, Pty., Ltd.

Dammers and Van Der Heide Shipping and Trading Company, Ltd.

Synopsis: Notice is hereby given that the Federal Maritime Commission, pursuant to section 6(d) of the Shipping Act of 1984 (46 U.S.C. app. 1705), has requested additional information from the parties to the Agreement in order to complete the statutory review of Agreement No. 203-011281 required by the Act (See 55 FR 24156; June 14, 1990). This action extends the review period as provided in section 6(c) of the Act.

By Order of the Federal Maritime Commission.

Dated: July 13, 1990.

Joseph C. Polking,  
Secretary.

[FR Doc. 90-16832 Filed 7-18-90; 8:45 am]

BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

### Banco Bilbao Vizcaya, S.A.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23 (a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23 (a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 3, 1990.

**A. Federal Reserve Bank of New York** (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045;

1. *Banco Bilbao Vizcaya, S.A.*, Bilbao, Spain; to acquire New Mexico Banquest Corporation, Santa Fe, New Mexico, and thereby engage in the sale of credit life,

accident and health and property and casualty insurance directly related to extensions of credit by bank subsidiaries of Company pursuant to section 4(c)(8)(D) of the Bank Holding Company Act and § 225.25(b)(8)(iv) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, July 12, 1990.

Jennifer J. Johnson,  
Associate Secretary of the Board.

[FR Doc. 90-16804 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

### Community Bank Corp., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice has applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than August 10, 1990.

**A. Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Community Bank Corporation*, Grant, Michigan; to become a bank holding company by acquiring 100 percent of the voting shares of The Grant State Bank, Grant, Michigan.

2. *Johnson Heritage Bancorp., Ltd.*, Racine, Wisconsin; to acquire 100 percent of the voting shares of Biltmore Bank Corp., Phoenix, Arizona, and thereby indirectly acquire Biltmore Investors Bank, N.A., Phoenix, Arizona.

3. *Marshall & Ilsley Corporation*, Milwaukee, Wisconsin; to acquire 100 percent of the voting shares of

Rosendale Bancshares, Inc., Rosendale, Wisconsin, and thereby indirectly acquire Rosendale State Bank, Rosendale, Wisconsin.

**B. Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Jackson Bancorporation*, Jackson, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Bank Midwest, Minnesota Iowa, National Association, Jackson, Minnesota; and Fairmont Bancorporation, Fairmont, Minnesota, and thereby indirectly acquire Bank Midwest, Minnesota Iowa, National Association, Fairmont, Minnesota.

**C. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Park Investments, Inc.*, Kansas City, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of The Park National Bank of Kansas City, Kansas City, Missouri.

Board of Governors of the Federal Reserve System, July 12, 1990.

Jennifer J. Johnson,  
Associate Secretary of the Board.

[FR Doc. 90-16805 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

### Johnson International Bancorp. Ltd.; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company has also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the

application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 10, 1990.

**A. Federal Reserve Bank of Chicago**  
(David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Johnson International Bancorp, Ltd.*, Racine, Wisconsin; to acquire 100 percent of the voting shares of *Johnson Heritage Bancorp, Ltd.*, Racine, Wisconsin, and thereby indirectly acquire *Rock County National Bank of Janesville*, Janesville, Wisconsin; *Heritage Bank of Kenosha*, Kenosha, Wisconsin; *Heritage Bank of Mukwonago*, Mukwonago, Wisconsin; *Heritage Bank & Trust*, Wind Point, Wisconsin; and *Bank of Hayward*, Hayward, Wisconsin.

In connection with this application, Applicant also proposes to acquire *Johnson Heritage Trust Company*, Racine, Wisconsin, and thereby engage in trust company functions pursuant to § 225.25(b)(3) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, July 12, 1990.

Jennifer J. Johnson,  
Associate Secretary of the Board.  
[FR Doc. 90-16806 Filed 7-18-90; 8:45 am]  
BILLING CODE 6210-01-M

**Bank of Montreal; Proposal to Provide Investment Advisory Services on Stock and Bond Index Futures and Options**

Bank of Montreal, Montreal, Quebec,

Canada, has applied pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) ("BHC Act") and § 225.23(a) of the Board's Regulation Y (12 CFR 225.23(a)), to engage *de novo* indirectly through its subsidiaries, *Bankmont Financial Corp.*, New York, New York, *Harris Bankcorp, Inc.*, Chicago, Illinois, and *Harris Investment Management, Inc.*, Chicago, Illinois, in providing investment advice as a commodity trading advisor registered with the Commodity Futures Trading Commission on futures contracts and options thereon on broad-based stock and bond indexes traded on major commodity exchanges. Company will not execute and clear futures contracts for accounts of customers or for its own account. Bank of Montreal proposes that these activities be conducted throughout the United States.

The proposed futures contracts and options thereon are: (a) The Bond Buyer Municipal Bond Index futures contract and options thereon, (b) the Financial Times Stock Exchange 100 futures contract, (c) the Kansas City Value Line Index futures contract, (d) the New York Stock Exchange Composite Index futures contract and options thereon, (e) the Nikkei Stock Average futures contract, (f) the Standard and Poor's 500 Stock Price Index futures contract and options thereon and (g) the Major Market Index futures contract.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with prior Board approval, engage directly or indirectly in any activities "which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or management or controlling banks as to be a proper incident thereto." The Board has previously determined by Order that the execution and clearance of the above futures contracts and options thereon and the provision of investment advisory services with respect to such futures contracts and options thereon proposed by Bank of Montreal is closely related to banking. See e.g., *BankAmerica Corporation*, 75 Federal Reserve Bulletin 78 (1989); *Northern Trust Corporation*, 74 Federal Reserve Bulletin 333 and 502 (1988); *Citicorp*, 73 Federal Reserve Bulletin 220 (1987).

In publishing the proposal for comment, the Board does not take any position on issues raised by the proposal under the BHC Act. Notice of the proposal is published solely in order to seek the views of interested persons on the issues presented by the application

and does not represent a determination by the Board that the proposal meets or is likely to meet the standard of the BHC Act.

Any comments or requests for a hearing should be submitted in writing and received by Williams W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than August 10, 1990. Any request for a hearing on this application must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

This application may be inspected at the office of the Board of Governors or the Federal Reserve Bank of Chicago.

Board of Governors of the Federal Reserve System, July 12, 1990.

Jennifer J. Johnson,  
Associate Secretary of the Board.  
[FR Doc. 90-16806 Filed 7-18-90; 8:45 am]  
BILLING CODE 6210-01-M

**Bonduel Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than August 13, 1990.

**A. Federal Reserve Bank of Chicago**  
(David S. Epstein, Vice President) 230  
South LaSalle Street, Chicago, Illinois  
60690:

1. *Bonduel Bancorp. Inc.*, Bonduel, Wisconsin; to become a bank holding company by acquiring 80 percent of the voting shares of Bonduel State Bank, Bonduel, Wisconsin.

**B. Federal Reserve Bank of St. Louis**  
(Randall C. Sumner, Vice President) 411  
Locust Street, St. Louis, Missouri 63166:

1. *Wayne City Bancorp. Inc.*, Springfield, Illinois; to become a bank holding company by acquiring at least 98.3 percent of the voting shares of First National Bank of Wayne City, Wayne City, Illinois.

Board of Governors of the Federal Reserve System, July 13, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-16836 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

**Compagnie Financiere de Suez and Banque Indosuez; Application To Engage de Novo in Providing Investment Advice, Execution and Clearance of Future Contracts and Options on Futures Contracts on Stock Indexes**

Compagnie Financiere de Suez and Banque Indosuez, both of Paris, France ("Applicants"), have applied pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843 (c)(8)) ("BHC Act") and § 225.23(a) of the Board's Regulation Y (12 CFR 225.23(a)), through their wholly owned subsidiary, Indosuez Carr Futures Inc., Chicago, Illinois ("Company"), to engage de novo in providing certain investment advice and to engage in the execution and clearance on major commodity exchanges of various futures contracts and options thereon as a futures commission merchant ("FCM"). Specifically, Applicants propose that Company provide investment advice and engage in the execution and clearance on the Chicago Mercantile Exchange of the Standard & Poor's 500 Stock Price Index futures contract ("S & P 500") and options thereon and on the Chicago Board of Trade of the Major Market Index futures contract ("MMI"). These activities would be conducted on a nationwide basis.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity "which the Board, after due

notice and opportunity for hearing, has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." Applicants believe that these proposed activities are "so closely related to banking or managing or controlling banks as to be a proper incident thereto."

The Board has previously approved the execution and clearance of the stock index futures contracts and options thereon for which Applicants seek authority, as well as the provision of related investment advice. See, e.g., *Chemical Bank*, 76 Federal Reserve Bulletin — (1990) (S & P 500, options on the S & P 500); *The Long-Term Credit Bank of Japan, Limited*, 74 Federal Reserve Bulletin 573 (1988) (S & P 500, options on S & P 500, MMI). Applicants have made the commitments set forth in §§ 225.25(b)(18) and (19) of Regulation Y considered by the Board in previous Orders.

Applicants take the position that the proposed activities will benefit the public. Applicants believe that they will promote competition and provide added convenience to customers of Company. Moreover, Applicants believe that these benefits will outweigh any possible adverse effects of the proposed activities and that, indeed, no adverse effects are currently foreseen.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than August 11, 1990. Any request for a hearing on this application must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

This application may be inspected at the offices of the Board of Governors of the Federal Reserve Bank of New York.

Board of Governors of the Federal Reserve System, July 13, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-16841 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

**Deutsche Bank AG; Application To Establish a Section 20 Subsidiary, Underwrite and Deal in All Types of Securities, Engage in Other Securities Related Activities, and Engage in Other Nonbanking Activities**

Deutsche Bank AG, Frankfurt, Federal Republic of Germany ("Applicant"), has applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) (the "BHC Act"), and § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)), for approval to retain the direct or indirect ownership of the United States subsidiaries of Morgan Grenfell plc, England ("Morgan Grenfell"), and thereby engage, through the subsidiaries listed below, in the activities described below.

Applicant has applied to acquire C.J. Lawrence, Morgan Grenfell, Inc., New York, New York ("CJLMG"), and thereby indirectly engage in underwriting and dealing in the following types of debt and equity securities:

(i) Debt securities, including without limitation, sovereign debt securities, corporate debt, debt securities convertible into equity securities, and securities issued by a trust or other vehicle secured by or representing interests in debt obligations; and

(ii) Equity securities, including, without limitation, common stock, preferred stock, American Depositary Receipts, and other direct and indirect equity ownership interests in corporations and other entities.

The Board has previously determined that underwriting and dealing in these types of securities is closely related to banking. See *Canadian Imperial Bank of Commerce*, *The Royal Bank of Canada*, *Barclays PLC*, *Barclays Bank PLC*, 76 Federal Reserve Bulletin 158 (1990) ("Canadian Imperial"). Applicant proposes to conduct these underwriting and dealing activities in accordance with the framework established in *Canadian Imperial*, with the following three exceptions. First, in the case of ineligible securities in which CJLMG makes a market in American Depositary Receipts ("ADRs"), Applicant proposes that CJLMG may purchase from or sell to foreign affiliates the underlying foreign shares represented by such ADRs and ADRs themselves in such quantities as are reasonably related to CJLMG's current *bona fide* indications of buying or selling interests by unrelated third parties. Applicant states that this modification is consistent with the Board's treatment of the purchase or

sale of ineligible securities underwritten by CJLMG. See Commitment Number 19 in *Canadian Imperial*. Second, Applicant proposes that CJLMG engage in underwriting and dealing in all types of securities while Applicant's subsidiary Deutsche Bank Capital Corporation continues to engage in these activities, under section 8(c) of the International Banking Act of 1978. Finally, since Applicant is acquiring an on-going business, Applicant proposes that CJLMG continue engaging in underwriting and dealing activities prior to the Board's review of its infrastructure. Applicant maintains that this modification is justified because of the potential damage to CJLMG should it be required to cease its activities.

Applicant has also applied to engage through CJLMG in (1) acting as a financial advisor by rendering advice with respect to arranging, structuring, financing, and negotiating domestic and international mergers, acquisition, divestitures, recapitalizations, joint ventures, leveraged buyouts, financing transactions and other corporate transactions for affiliated and unaffiliated institutional customers, and to provide ancillary services or functions incidental to these activities; (2) providing valuation services in connection with corporate transactions; (3) providing fairness opinions in connection with corporate transactions; and (4) providing financial feasibility studies, principally in the context of determining the financial attractiveness and feasibility of corporate transactions (collectively "financial advisory services"). Applicant contends that the Board has previously approved these activities for bank holding companies. See *The Fuji Bank, Limited*, 75 Federal Reserve Bulletin 577 (1989) ("*Fuji Bank*"). Applicant proposes to conduct these activities in accordance with the commitments listed in *Fuji Bank*.

Applicant also proposes that CJLMG provide investment advisory and brokerage activities separately and on a combined basis subject to most of the conditions previously approved by the Board in its prior Orders. 12 CFR 225.25(b)(4) and (b)(15), and *PNC Financial Corp.*, 75 Federal Reserve Bulletin 396 (1989). Applicant also proposes to provide financial advice to foreign governments. The Board has previously approved this activity. See *The Bank of Tokyo, Limited*, 76 Federal Reserve Bulletin \_\_\_\_ (Order dated June 4, 1990).

Applicant proposes that CJLMG offer discretionary investment management services in combination with brokerage services to both institutional and retail

customers. The Board has previously approved this activity for institutional customers only, subject to certain parameters. *J.P. Morgan & Co. Incorporated*, 73 Federal Reserve Bulletin 810 (1987). Applicant proposes to market and solicit these accounts. Applicant contends that this activity is closely related to banking and a proper incident thereto. Applicant contends that the provision of investment management services and brokerage service is permissible for national banks. Applicant contends that the anti-fraud provisions of the securities laws and fiduciary rules and regulations mitigate the potential adverse effects.

Applicant also seeks approval to acquire Morgan Grenfell Capital Financing Securities Company, San Francisco, California ("*MGCFCSC*"), and thereby indirectly engage, through both MGCFCSC and CJLMG in acting as agent in the private placement of all types of securities, pursuant to most of the methods, terms and conditions set out in the Board's Orders in *J.P. Morgan & Company, Incorporated*, 76 Federal Reserve Bulletin 26 (1990) and *Bankers Trust New York Corporation*, 75 Federal Reserve Bulletin 829 (1990) ("*Bankers Trust*"). In particular, Applicant proposes that CJLMG privately place unrated securities of affiliates to individuals whose net worth exceeds \$1,000,000. In *Bankers Trust*, the Board permitted the placement agent to place unrated securities of an affiliate only with institutions. Applicant maintains that customers with a net worth in excess of \$1,000,000 would be sophisticated to properly evaluate the creditworthiness of the securities being placed.

In addition, Applicant proposes that CJLMG conduct riskless principal activities. The Board has approved the purchase and sale of all types of securities on the order of investors as "riskless principal" under certain limitations. See *Bankers Trust*. CJLMG would conduct this activity within the limitations placed on these activities in previous decisions.

Applicant has also applied for permission to acquire, for Morgan Grenfell Finance Incorporated, New York, New York ("*MGFI*"), and indirectly engage, through MGFI, in trading for MGFI's own account in foreign exchange and in foreign exchange forward, futures, options, and options on futures contracts for hedging and non-hedging purposes. Applicant contends that the Board has previously approved these activities as closely related to banking. *The Long-Term Credit Bank of Japan, Limited*, 74

Federal Reserve Bulletin 573 (1988) ("*Long-Term Credit Bank*"). *The HongKong and Shanghai Banking Corporation*, 75 Federal Reserve Bulletin 217 (1989) ("*HongKong*"). Applicant proposes that MGFI conduct its activities with respect to foreign exchange forward, futures, options, and options on futures contracts in substantial compliance with *HongKong*. Applicant also proposes that MGFI engage in the following activities:

1. Intermediating in the international swap markets by acting as an originator and principal in interest rate swap and currency swap transactions;
2. Acting as an originator and principal with respect to certain risk-management products such as caps, floors and collars, as well as options on swaps, caps, floors and collars ("swap derivative products");
3. Acting as a broker or agent with respect to the foregoing transactions and instruments; and
4. Acting as an advisory to institutional customers regarding financial strategies involving interest rate and currency swaps and swap derivative products.

The Board has previously determined that these activities are closely related to banking. *The Sumitomo Bank, Limited*, 75 Federal Reserve Bulletin 582 (1989) ("*Sumitomo*"). MGFI would conduct its interest rate and currency swaps in accordance with the structure the Board found adequate to address potential adverse effects in *Sumitomo*.

Applicant has also applied for permission for MGFI to purchase and sell gold bullion for MGFI's own account. The Board has previously approved this activity for bank holding companies. *Westpac Banking Corporation*, 73 Federal Reserve Bulletin 61 (1987) ("*Westpac*"). Applicant also proposes that MGFI purchase and sell options, futures, and options on futures contracts with respect to gold bullion in order to hedge its position in gold bullion. See *Westpac*.

Applicant has also proposed that MGFI act as an "introducing broker" with respect to transactions in futures and options contracts based on foreign exchange in accordance with *The Nippon Credit Bank, Limited*, 75 Federal Reserve Bulletin 308 (1989).

Applicant proposes that MGFI underwrite and deal in securities that state member banks are permitted to underwrite and deal in under the Glass-Steagall Act ("bank-eligible securities"), pursuant to § 225.25(b)(16) of the Board's Regulation Y (12 CFR 225.25(b)(16)). MGFI would also purchase and sell options and futures contracts based on bank-eligible securities to hedge its position in the securities. Applicant proposes that MGFI also engage in

repurchase and reverse repurchase transactions with respect to U.S. government obligations. See *Long-Term Credit Bank*.

Applicant proposes to acquire Morgan Grenfell Capital Financing Company, San Francisco, California ("MGCFC"), and thereby indirectly engage, through MGCFC, in (i) providing advice regarding the structuring of leasing and financing projects, (ii) acting as agent, broker, or advisor for sophisticated investors wishing to engage in corporate leasing and financing activities, including leasing on a nonrecourse basis, and (iii) acting as a remarketing agent with respect to leased property. Applicant contends that these activities are permissible under §§ 225.25(b)(1) and (b)(5) of the Board's Regulation Y, as interpreted by the Board in its Orders, 12 CFR 225.25(b)(1) and (b)(5). *MNC Financial*, 76 Federal Reserve Bulletin 89 (1990); *The Bank of New York Company* 74 Federal Reserve Bulletin 257 (1988); *The Chase Manhattan Corporation*, 72 Federal Reserve Bulletin 201 (1986); and *First Interstate Bankcorp*, 70 Federal Reserve Bulletin 659 (1984).

Applicant proposes that it acquire 85 percent of Morgan Grenfell Laurie Incorporated, New York, New York ("MG Laurie"), and thereby engage, through MG Laurie, in (i) assisting clients in locating and analyzing income producing real property interests, and acting as an intermediary for the financing of commercial real estate equity projects; (ii) providing investment advice with regard to income-producing commercial real estate properties, including the solicitation of primarily non-U.S. investors of potential commercial real estate financing opportunities; and (iii) upon securing financing for commercial real estate properties, providing assistance in implementing investor's decisions, including the monitoring of and making marketing recommendations for the financial and technical aspects of property management on a nonoperating basis. Applicant contends that the first activity is permissible under § 225.25(b)(14) of the Board's Regulation Y (12 CFR 225.25(b)(14)). MG Laurie would conduct this activity in accordance with the requirements of the Board's Regulation. Applicant further contends that the second and third activities are permissible under § 225.25(b)(4) of the Board's Regulation Y (12 CFR 225.25(b)(4)).

Applicant has also applied to acquire Morgan Grenfell Capital Management Incorporated, New York, New York ("MGCMI"), and thereby indirectly

provide, through MGCMI, investment advice, including portfolio investment advice and investment management services to pension funds, other institutional accounts and individuals. Applicant contends that this activity is permissible under § 225.25(b)(4) of the Board's Regulation Y (12 CFR 225.25(b)(4)).

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with prior Board approval, engage directly or indirectly in any activities "which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto."

A particular activity may be found to meet the "closely related to banking" test if it is demonstrated that banks have generally provided the proposed activity; that banks generally provide services that are operationally or functionally so similar to the proposed activity so as to equip them particularly well to provide the proposed activity; or that banks generally provide services that are so integrally related to the proposed activity as to require their provision in a specialized form. *National Courier Ass'n v. Board of Governors*, 516 F.2d 1229, 1337 (DC Cir. 1975). In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. Board Statement Regarding Regulation Y, 49 FR 806 (1984).

In determining whether an activity meets the second, or proper incident to banking, test of section 4(c)(8), the Board must consider whether the performance of the activity by an affiliate of a holding company "can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."

Applicant contends that the proposed activities would benefit the public by permitting the U.S. subsidiaries of Morgan Grenfell to continue offering to their customers the professional services which Morgan Grenfell currently offers. Applicant maintains that the continued operation of Morgan Grenfell's U.S. subsidiaries would also further competition in the markets in which the subsidiaries operate and would likely result in increased competition which would mean increased opportunities and

lower prices for users of these services. Moreover, Applicant maintains that approval of the proposed activities would enhance the ability of banking organizations operating in the U.S. market to retain and expand their customer base and to remain competitive in providing a full range of financial services and in participating in the development of new financial products. Applicant submits that the proposal would not result in adverse effects but rather, would result in increased levels of competition among competitors in the relevant markets.

Applicant contends that approval of the application would not be barred by section 20 of the Glass-Steagall Act (12 U.S.C. 377). Section 20 of the Glass-Steagall Act prohibits the affiliation of a member bank with a firm that is "engaged principally" in the "underwriting, public sale or distribution" of securities. With regard to the proposed ineligible securities underwriting and dealing activities, Applicant states that, consistent with section 20, it would not be "engaged principally" in such activities on the basis of the restriction on the amount of the proposed activity relative to the total business conducted by the underwriting subsidiary previously approved by the Board. See Board's Order dated September 21, 1989, 75 Federal Reserve Bulletin 751 (1989).

In publishing the proposal for comment, the Board does not take any position on issues raised by the proposal under the BHC Act. Notice of the proposal is published solely in order to seek the views of interested persons on the issues presented by the application and does not represent a determination by the Board that the proposal meets or is likely to meet the standards of the BHC Act.

Any views or requests for a hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than August 7, 1990. Any request for a hearing must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented in a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

This application may be inspected at the offices of the Board of Governors or the Federal Reserve Bank of New York.

Board of Governors of the Federal Reserve System, July 13, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-16840 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

**David H. Kipper, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies**

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 2, 1990.

**A. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President), 925 Grand Avenue, Kansas City, Missouri 64198:

1. *David H. Kipper*, Denver, Colorado; to acquire an additional 15.3 percent of the voting shares of Colonial Bancorp., Denver, Colorado, for a total of 35.2 percent, and thereby indirectly acquire Colonial National Bank, Denver, Colorado.

2. *Robert Sellard*, Mullinville, Kansas, as trustee; to acquire 59.3 percent of the voting shares of First State Holding Co., Mullinville, Kansas, and thereby indirectly acquire First State Bank, Mullinville, Kansas.

3. *Robert Sellard*, Mullinville, Kansas, as trustee; to acquire 100 percent of the voting shares of Ingalls Insurance Agency, Ingalls, Kansas, and thereby indirectly acquire Farmers State Bank, Ingalls, Kansas.

Board of Governors of the Federal Reserve System, July 13, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-16837 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

**Trans Financial Bancorp., Inc., et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities**

The organizations listed in this notice have applied under § 225.23 (a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23 (a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than August 13, 1990.

**A. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President), 411 Locust Street, St. Louis, Missouri 63166:

1. *Trans Financial Bancorp., Inc.*, Bowling Green, Kentucky; to acquire First Federal Savings and Loan Association of Russellville, Russellville, Kentucky, and thereby engage in operating a savings association pursuant to § 225.25(b)(9) of the Board's Regulation Y. This activity will be conducted in Russellville, Kentucky.

**B. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice

President), 925 Grand Avenue, Kansas City, Missouri 64198:

1. *United Nebraska Financial Co.*, Ord, Nebraska; to acquire United Nebraska Savings and Loan Association, Ogallala, Nebraska, and thereby engage in operating a savings and loan association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, July 13, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-16839 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

**United Nebraska Financial Co., et al.; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; and Acquisitions of Nonbanking Companies**

The companies listed in this notice have applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed companies have also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the

reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 13, 1990.

A. Federal Reserve Bank of Kansas City (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *United Nebraska Financial Co.*, Ord, Nebraska; to acquire United Nebraska Bank, O'Neill, O'Neill, Nebraska, a *de novo* bank.

In connection with this application, Applicant also proposes to acquire United Nebraska Savings and Loan Association, O'Neill, O'Neill, Nebraska, and thereby engage in operating a savings and loan association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

2. *West Point Bancorp, Inc.*, West Point, Nebraska; to acquire Farmers and Merchants State Bank, Wayne, Nebraska, a *de novo* bank.

In connection with this application, Applicant also proposes to acquire West Point Savings Association, Wayne, Nebraska, and thereby engage in operating a savings and loan association pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, July 13, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-16838 Filed 7-18-90; 8:45 am]

BILLING CODE 6210-01-M

## FEDERAL TRADE COMMISSION

[File No. 891 0054]

### E-Z-EM, Inc., et al.; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, a Westbury, N.Y., based corporation to divest the Lafayette Pharmacal barium business

and assets to a Commission-approved acquirer. Respondents would be prohibited, for a period of ten years, from acquiring any interest in any other firm in the relevant market and from selling or otherwise disposing of any interest in or assets of respondents to such a firm without prior Commission approval.

**DATES:** Comments must be received on or before September 17, 1990.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Steven Newborn, FTC/S-2308, Washington, DC 20580. (202) 326-2682.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Commissioners: Janet D. Steiger, Chairman, Terry Calvani, Mary L. Azcuenaga, Andrew J. Strenio, Jr., Deborah K. Owen.

### Agreement Containing Consent Order

The Federal Trade Commission having initiated an investigation of the acquisition by E-Z-EM, Inc. ("E-ZM") of the barium diagnostic products business of Lafayette Pharmacal, Inc.

("Lafayette"), and it now appearing that E-ZM is willing to enter into an Agreement Containing a Consent Order ("Agreement") to divest certain assets and cease and desist from certain acts,

It is hereby agreed by and between E-ZM, by its duly authorized officers and their attorneys, and Howard S. Stern and Phillip H. Meyers, individually and as officers of said corporation, and counsel for the Commission that:

1. Proposed respondent E-ZM is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 7 Portland Avenue, Westbury, New York 11590.

2. Howard S. Stern is a Director, Chairman of the Board, and Chief Executive Officer of E-ZM, and the beneficial owner of approximately 34

percent of the outstanding shares of common stock of E-ZM, with his business address at 7 Portland Avenue, Westbury, New York 11590.

3. Phillip H. Meyers is a Director, Senior Vice President, and Medical Director of E-ZM, and the beneficial owner, jointly with Betty S. Meyers, of approximately 34 percent of the outstanding common stock of E-ZM, with his business address at 7 Portland Avenue, Westbury, New York 11590.

4. Proposed respondents admit all the jurisdictional facts set forth in the draft of complaint here attached.

5. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the

Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this Agreement; and

(d) Any claim under the Equal Access to Justice Act.

6. This Agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this Agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

7. This Agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft of complaint here attached.

8. This Agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following Order to divest and to cease and desist in disposition of the proceeding and (2) make information public with respect thereto. When so

entered, the Order to divest and to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to Order to proposed respondents' address as stated in this Agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the Agreement may be used to vary or contradict the terms of the Order.

9. Proposed respondents have read the proposed complaint and Order contemplated hereby. Proposed respondents understand that once the Order has been issued, they will be required to file one or more compliance reports showing they have fully complied with the Order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

#### Order

#### I

As used in this Order, the following definitions shall apply:

A. *EZM* means E-Z-ME, Inc., its predecessors, successors and assigns, parents, subsidiaries, divisions, groups controlled by EZM, and affiliates, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. *Lafayette* means Lafayette Pharmacal, Inc. as it was constituted prior to the acquisition, its predecessors, parents, subsidiaries, divisions, groups controlled by Lafayette, and affiliates, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. *Acquisition* means acquisition by EZM of the barium diagnostic products business and related assets of Lafayette.

D. *Barium diagnostic products business* means the business of either manufacturing or importing barium diagnostic products and marketing and selling those products to distributors and or end-users, except that it does not extend to the distribution and selling, by one primarily engaged in distributing and selling x-ray supplies, of barium

diagnostic products produced or imported by another firm, to end-users.

E. *Barium diagnostic products manufacturing plant* means the premises described in numbered paragraph 1 of Schedule A of this Order.

F. *Schedule A Properties* means the assets and manufacturing plant listed in Schedule A of this Order.

#### II

##### *It is ordered that:*

A. EZM shall divest, absolutely and in good faith, within twelve (12) months of the date this Order becomes final, the Schedule A Properties, as well as any additional assets relating to the barium diagnostic products business that EZM may at its discretion include as a part of the assets to be divested and that are acceptable to the acquiring entity.

B. Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the barium diagnostic products business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. On or before the date six weeks prior to the closing by which the Schedule A Properties will be divested, EZM shall make available to the acquirer or acquirers of the Schedule A Properties the names, addresses, titles, job descriptions, and salary histories of two-thirds of its employees concerned with the barium diagnostic products business and EZM shall not interfere in any way with the hiring of any of those employees by the acquirer or acquirers of the Schedule A Properties.

D. On or before the date six weeks prior to the closing by which the Schedule A Properties will be divested, EZM shall make available all records it has of the names and most recent addresses and telephone numbers of all former Lafayette employees to the acquirer of the Schedule A Properties.

E. Respondents shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business to be divested except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Schedule A Properties. In this regard:

1. Respondents shall maintain the Schedule A Properties, including both premises and assets to the extent and in the manner maintained by Lafayette prior to the acquisition.

2. Respondents shall maintain and perform in good faith all contracts for products sold under the trade names transferred to EZM by the acquisition, and will refrain from taking any action toward terminating such contracts other than that which would be commercially reasonable under the terms of those agreements.

3. Respondents shall, at the option of the acquirer of the Schedule A Properties, continue to maintain in good faith, on identical terms, conditions and stipulations, all contracts for barium products sold under the trade names transferred to EZM by the acquisition that expire by their terms prior to divestiture for a period lasting until such divestiture is completed.

#### III

##### *It is further ordered that:*

A. If EZM has not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within twelve (12) months of the date this Order becomes final, EZM shall consent to the appointment by the Commission of a trustee to divest the Schedule A Properties. In the event the Commission or the Attorney General brings an action pursuant to section 5 (7) of the Federal Trade Commission Act, 15 U.S.C. 45 (7), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee to divest the Schedule A Properties. Neither the appointment of a trustee nor a decision not to appoint a trustee shall constitute a waiver by the Commission or the Attorney General of its right to seek civil penalties and other relief available to it, including a court-appointed trustee, for any violation of this Order.

(B) If a trustee is appointed by the Commission or a court pursuant to Paragraph III. A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of EZM, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest the Schedule A Properties. The trustee shall have twelve (12) months from the date of

appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee, *Provided*, however, That the Commission or the court for a court-appointed trustee may only extend the divestiture period two (2) times.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of EZM relating to the schedule A Properties, and EZM shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Respondents shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to EZM's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in Paragraphs II.A. and II.B. of this Order.

5. The trustee shall serve, without bond or other security at the cost and expense of EZM, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of EZM, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as may be reasonably necessary. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to EZM and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (percentage of price) that is contingent on the trustee's divesting the Schedule A Properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of the monies derived from the divestiture.

6. Within fifteen (15) days after appointment of the trustee and subject to the Commission's prior approval and, if the trustee was appointed by a court, subject also to the prior approval of the

court, EZM shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture of the Schedule A Properties and sign agreements.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraphs IV.A. and IV.B., for the balance of the time periods specified in Paragraph IV.B.2 or any extensions thereof. EZM shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this Order. The trustee shall have no obligation or authority to operate or maintain the Schedule A Properties.

8. The trustee shall report in writing to EZM and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

9. If EZM and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the assets, then EZM and the trustee shall submit the dispute to the Commission for resolution, but the time periods shall continue to run. The trust agreement shall recite that the Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon EZM and the trustee.

#### IV

*It is further ordered that*, within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until EZM has fully complied with the provisions of Paragraphs II and III of this Order, EZM shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with those provisions. EZM shall include in its compliance reports, among other things that are required from time to time, a full description of the contacts or negotiations for the divestiture of the Schedule A Properties, including the identify of all parties contacted. EZM also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

#### V

*It is further ordered that:*

A. Until divestiture of the Schedule A properties is final, respondents are prohibited from acquiring, directly or indirectly, any interest in any person or business that is engaged in the barium diagnostic products business in the United States.

B. For a ten (10) year period commencing on the date this Order becomes final, EZM shall cease and desist from selling or disposing of in any other way, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any assets, related to, or used or previously used in (and still suitable for use in) the barium diagnostic products business or the whole or any part of EZM stock or share capital to any person or business that is engaged in the barium diagnostic products business in the United States, except that EZM may continue to sell barium diagnostic products and dispose of used equipment in the ordinary course of business.

C. For a ten (10) year period commencing on the date this Order becomes final EZM shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any stock or share capital of, or interest in, any person that is engaged in the barium diagnostic products business in the United States, or any assets related to, or currently or previously used in (and still suitable for use in) the barium diagnostic products business in the United States except raw material and new equipment purchased in the ordinary course of business. *Provided*, however, that Paragraph V.C. shall not apply to the construction of new facilities.

D. For a ten (10) year period commencing on the date this Order becomes final, respondents Stern and Meyers (but only so long as they remain shareholders, officers, or directors of EZM) shall give thirty (30) days' prior notice to the Federal Trade Commission before selling or disposing of in any other way, individually or jointly, directly or indirectly, through subsidiaries or otherwise, the whole or any part of their holdings of EZM stock or share capital to any person or business that is engaged in the barium diagnostic products business in the United States.

## VI

It is further ordered that one year from the date this Order becomes final, annually thereafter for nine (9) years, and at such other times as the Commission or its staff may request, Respondents shall each file with the Commission a verified written report of their compliance with Paragraph V.

## VII

It is further ordered that EZM shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change that may affect compliance obligations arising out of the Order.

## Schedule A

The properties to be divested by EZM, as provided in the Agreement and Consent Order, are the following assets:

1. The manufacturing plant located at 526 North Earl Avenue, Lafayette, Indiana 47902, including all the land, all buildings and improvements on the land, and all machinery and other equipment used in the testing, formulation, production, packing, shipping, or for any other purpose relating to the barium diagnostic products business that were transferred by the December 22, 1988 acquisition agreement between EZM and Lafayette ("the premises").

2. All other assets of Lafayette transferred by the December 22, 1988, acquisition agreement, including all of Lafayette's right, title and interest in and to all corporate names, trade names, service marks, know-how, trade secrets, product formulas, and other intellectual property (including all applications relating thereto) of the Lafayette barium diagnostic products business and all customer lists, sales and credit reports, sales literature, manuals, regulatory permits and other filings with and approvals by regulatory authorities and product formulas. The assets include all assets and rights relating to the business acquired by Lafayette from Mallinckrodt, Inc., Alcon Laboratories, Inc., C.B. Fleet Company, Incorporated and their respective subsidiaries and affiliates ("the assets").

## Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement containing a proposed Consent Order from E-Z-EM, Inc., and Howard S. Stern and Phillip H.

Meyers, who are officers, directors, and substantial shareholders of E-Z-EM.

The proposed Consent Order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement's proposed Order.

The proposed complaint alleges that E-Z-EM has acquired a monopoly in the barium diagnostic products business by acquiring all of the barium business and assets of Lafayette Pharmacal, Inc. It alleges also that the relevant geographic market is the United States and that this market is highly concentrated and that entry into this market is extremely difficult. It alleges that as a result of the acquisition, competition between E-Z-EM and Lafayette Pharmacal has been eliminated and that if another firm should become a substantial competitor, the likelihood of collusion between E-Z-EM and that firm would be increased.

The proposed Agreement and Order provides that E-Z-EM must divest the Lafayette Pharmacal barium business and assets to an acquirer that must be approved in advance by the Commission and in a manner approved by the Commission. It also provides that for a period of ten years E-Z-EM may not acquire any interest in any other firm in the relevant market or sell or otherwise dispose of any interest in or assets of E-Z-EM to such a firm without prior approval from the Commission. In addition, respondents Stern and Meyers must give the Commission 30 days' notice before disposing of any of their E-Z-EM stock or share capital to any person or business engaged in the barium diagnostic products business in the United States.

The anticipated competitive effect of the proposed Order will be to restore competition in the United States market for barium diagnostic products.

The purpose of this analysis is to facilitate public comment on the proposed Order, and it is not intended to constitute an official interpretation of the Agreement and proposed Order or to modify in any way their terms.

Donald S. Clark,

Secretary.

[FR Doc. 90-16854 Filed 7-18-90; 8:45 am]

BILLING CODE 6750-01-M

## Bureau of Indian Affairs

## Proposed Finding Against Federal Acknowledgment of Miami Nation of Indians of State of Indiana, Inc.

July 12, 1990.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Pursuant to 25 CFR 83.9(f) (formerly 25 CFR 54.9(f)), notice is hereby given that the Assistant Secretary proposes to decline to acknowledge that the Miami Nation of Indians of the State of Indiana, Inc., c/o Mr. Raymond O. White, Jr., P.O. Box 41, Peru, Indiana 46970, exists as an Indian tribe within the meaning of Federal law. This notice is based on a determination that the group does not meet two of the mandatory criteria set forth in 25 CFR 83.7 and, therefore, does not meet the requirements necessary for a government-to-government relationship with the United States.

The Miami Nation of Indians of the State of Indiana is based in Peru, Indiana. It's 4,381 members are spread over most of the State of Indiana, although there are clusters of the group's population in the upper Wabash Valley counties which were the major areas of habitation of the historic Miami tribe before the removal of part of the tribe to the West in 1846.

Today's members of the Miami Nation of Indians of the State of Indiana are predominantly lineal descendants of the Miami tribe which lived in this area since the early 1700's, although when first contacted by French fur traders and missionaries the tribe's population ranged from Michigan westward across northern Indiana. Both historically and up through the present day, the petitioner has been repeatedly identified by Federal and State officials, local historians, other Indian tribes and local non-Indians as an American Indian entity.

The Miami tribe in the 1700's consisted of a series of village-based bands. There were approximately 10 such villages immediately before removal in 1846. Approximately 300 individuals either remained after removal or returned. Four groups of kinsmen had land after removal and formed subgroups which were small, land-based social and economic communities.

A combination of taxation and economic difficulties forced the Miamis off their lands beginning in the 1880's.

Most of the Meshingomesia subgroup's land was lost by 1900 and that of the other subgroups by the end of the 1920's. The breakup of the land-based communities and the migration to the nearby towns disrupted the social and economic relationships of the communities and resulted in a substantial reduction in social interaction within the tribe after 1910. An annual reunion was instituted about 1903 and subgroup differences continued to be important.

Extensive intermarriage within the Indiana Miami in the first generation after removal created intense kinship links between the subgroups. After the 1880's, however, most marriages were with local non-Indians and there were essentially no marriages within the Miami after 1907. Migration beyond the local area began after 1910 and became more substantial in the 1920's, and subgroup distinctions continued to be significant and the annual reunion continued to be held.

Approximately 36 percent of the 4,400 present-day Indiana Miami members live within the four-county area which approximates their premarital territory. There are no distinct territorial areas which are largely or exclusively Miami.

There was not sufficient data to conclusively determine the character of Miami social interaction with other Miamis in the core geographic area, with Miamis outside it, and with local non-Indians. Therefore, it could not be demonstrated that the core geographic area was also a core social area. The available data indicates that within the core geographic area there was some, but not substantial, social interaction between those Miamis not having a close kinship relationship. There are presently few close kinship ties between, as opposed to within, family lines. There are no clubs, churches or similar institutions which are exclusively or largely Miami.

The memberships outside the core geographic area did not form distinct population cluster, with the exception of those at South Bend and the western Indiana Miami (together about 19 percent of the membership). Almost all Miamis outside the area had a substantial number of relatives living within the core geographic area. This geographic distribution of kinsmen indicated that systematic communication between the core geographic area kinsmen and those outside was feasible, but the actual effectiveness of this could not be determined with the available data.

There are no cultural differences between the Miamis and the surrounding non-Indian population.

Miamis and non-Miamis in the core geographic area interact with each other extensively and in all kinds of social contexts. The limited available evidence indicates that Miamis and non-Miamis do not make significant distinctions in interacting. The limited data support a conclusion that most Miamis have some identify as Miami and the non-Indian population identifies the existence of a Miami population locally.

At least a portion of the Miami membership retains a significant degree of orientation to the subgroup differences which have characterized the Miami since removal. The annual reunion continues to be held.

The available evidence does not demonstrate that the Indiana Miami presently constitute a distinct community within which significant social interaction is maintained.

In the 1700's the Miami tribe consisted of a series of village-based bands led by distinct village chiefs. The tribe was not politically unified under a single chief until the latter part of the 18th century. By the 1760's, Pacanne was recognized as the principal chief of the entire Miami tribe. Between 1818 and 1840, J.B. Richardville was the most prominent of the Miami chiefs. Francis LaFontaine succeeded Richardville as principal chief in 1841. In the immediate pre-removal period, there were about 10 Miami villages with considerable reshuffling as the land base and the Miami population dwindled.

The removal of the 1840's effectively divided the Miami Tribe politically and socially into an eastern (Indiana) and western Miami tribe. The Indiana Miami, about 300 people, settled out into four kinship-based communities, the Godfroy, Slocum (Buddy, Richardville/LaFontaine and Meshingomesia. These were band-like communities on separate lands with distinct leaders.

Meshingomesia was dealt with as principal chief of the Indiana Miami after the death of Francis LaFontaine in 1847. There were distinct subgroup leaders such as Gabriel Godfroy, Peter Bundy, Pimyotomah and others who led the subgroups to the end of the 19th century and, in the case of Godfroy, into the 20th century. Meshingomesia was leader of his band from 1839 until he died in 1879. His grandson, William Pecong, replaced him. Francis Godfroy died in 1841 and was succeeded by his son-in-law, Black Loon. By 1860 he was succeeded by Gabriel Godfroy, one of Francis' sons. Close intermarriage between subgroups led to many kinship links between the subgroups and the leaders of the subgroups.

There is sufficient evidence to indicate that in the mid-19th to the early

20th centuries Miami leaders often acted in concert with a "council" to exert political influence over the group's members and to interact with outsiders.

From the 1840's to the 1890's, the leaders of both the Meshingomesia band and the bands based on individual reserve dealt with same major issues—who was entitled to be on the Miami roll, the 1881 payment of the principal sum due under the 1854 treaty and the taxation of Miami land. Actions for the overall tribe, such as a treaty negotiations in 1854, were generally decided in council of the several subgroup leaders.

A combination of taxation and economic difficulties forced the Miamis off their lands beginning in the 1880's. Most of the Meshingomesia subgroup's land was lost by 1900 and that of the other subgroups by the end of the 1920's. An 1897 Interior Department opinion that the tribe was not entitled to a Federal relationship overturned Miami court victories supporting the tax-free status of Miami lands and led to a renewal of taxation and the ultimate loss of the remaining Miami lands.

The era beginning in 1890 was a transition period, with some of the older leaders still active and younger leaders and new forms of organization emerging. Sometime in the years immediately around 1900, the Miamis created a formal organization directed at the critical issue of protecting the land and regaining recognized tribal status as well as the pursuit of additional claims.

The annual reunion, which evidently began in 1903, served at times up to around 1930 as a forum for discussing issues such as tribal status, hunting and fishing rights and claims. Apparently because of the factionalism, however, the business council function did not continue into the 1930's at the reunions.

The organization created shortly before the turn of the century continued to function as late as the late 1920's. However, beginning about 1917 and increasingly in the 1920's, the relationships between the subgroups developed into sharp factionalism, dividing over the issue of the best approach to seeking restoration of tribal status. Based in part on preexisting subgroup distinctions, with the added differences in the historic legal status of their lands, the Godfroys on the one hand and the Meshingomesias on the other formed competing organizations around 1930.

The Meshingomesia organization initially pursued restoration of tribal status and claims as its primary purpose. In 1937, it was incorporated as the "Miami Nation of Indians of

Indiana" and was also involved in Indian school and cemetery land issues and hunting and fishing rights. The organization became inactive in the early 1940's, although there is some limited information that informal activities on claims were carried out in the 1950's.

The organization of the Godfroy descendants was less active than the Miami Nation between its formation around 1930 and 1943, when it organized formally. Its leaders wrote to the Federal Government, asserting "wardship" status and protesting that the efforts of the Miami Nation to be restored did not represent the Godfroys.

Both organizations supported protests against State attempt to regulate and limit Miami hunting and fishing throughout the 1930's. This was an issue of widespread importance among the membership because many members continued to utilize hunting and fishing resources in the local area for subsistence throughout the 1930's.

Although the objectives of the Miami leaders and organizations between 1900 and the early 1940's were somewhat limited, i.e., focused on specific issues, these issues were of major importance to the Miami community. Tribal status and the related taxability of the land and its consequent loss forced the Miamis to make a radical change in their community structure and economy. Fishing and hunting rights appears to have been a significant issue for a major portion of the population. The leaders appear to have had a significant following, at least with regard to these issues, and there were still close kinship ties within the population.

Overall, there appears to be sufficient evidence of leaders with a significant following, although a limited political role, issues of significance to a broad spectrum of the tribal membership, and significant underlying social connections to conclude that the Miamis continued to have tribal political process between the 1890's and the early 1940's.

Between the early 1940's and 1979, the available evidence indicates there were only limited political processes and a narrow range of activities. Although there was some continuity of organization with earlier periods, the level and scope of activity was much reduced. For all of the period, what activities were evident were almost entirely limited to pursuit of claims and enrollment of members in connection with those claims. The annual reunion continued to include members of all of the factions, but is not known to have served any direct political functions. There was no strong evidence that the organizations, or those claiming tribal

leadership in this period, had broad support among a tribal membership which was by now much more widely dispersed geographically than in previous decades and whose kinship ties with each other were now more diffuse. There is also no strong evidence that these leaders had influence beyond these immediate issues or conducted other activities as leaders.

The most recent era of Miami organization began in approximately 1979, with the Miami efforts to petition for Federal acknowledgment. A unified organization involving all of the subgroups was created. This has developed rapidly, taking on a variety of functions in addition to Federal acknowledgment.

It was not possible to determine the breadth of interest, support and involvement in council actions by the Miami membership as a whole. That membership is now widely dispersed, no longer shares close kinship ties between family lines and it was not demonstrated that significant social contact is maintained within it. Thus, there has not been demonstrated significant social ties and contact from which to infer the existence of tribal political processes which more broadly encompass the membership than can be established on the basis of the direct evidence presently available.

Tribal political processes involving leaders with a broad following on issues of significance to the overall Miami membership have not existed within the Indiana Miami since the early 1940's.

The group's governing document describes how membership is determined and how the group governs its affairs and its members. Current membership criteria state that an individual must prove their lineage to any of several specified Federal lists and payrolls of Indiana Miamis created between 1846 and 1895. The specified Federal lists and payrolls are determined to be valid listings of accepted members of the Indiana portion of the historical Miami tribe. Ninety-eight percent of the group's 4,381 members claim descent from at least one Indiana Miami ancestor on the 1895 roll or the smaller 1889 roll; 75 percent claim two or more such ancestors. The petitioner's membership criteria also provide for the use of Federal census records (1840-1910) as proof of Indiana Miami heritage; however, these records are determined not to have the same validity as the Federal lists and payrolls have as evidence of "Indiana" Miami heritage. Ninety-eight percent of the members claim to trace to at least one ancestor on the 1895 or 1889 rolls. Eighty-six percent have documented

their ancestry to the satisfaction of the Secretary in order to share in one or more of three judgments awarded by the Indian Claims Commission (1966, 1972) and the U.S. Court of Claims (1982) to Indiana Miamis.

Less than 1 percent of the membership could be identified as members of recognized tribes in Oklahoma, Kansas and Missouri. No evidence was found that the Miami Nation of Indians of the State of Indiana, or its members, have been the subject of Federal legislation which has expressly terminated or forbidden a relationship with the United States.

Based on this preliminary factual determination, we conclude that the Miami Nation of Indians of the State of Indiana, Inc., meets criteria a, d, e, f, and g, but does not meet criteria b and c of § 83.7 of the Acknowledgment regulations (25 CFR part 83).

Section 83.9(g) of the regulations provides that any individual or organization wishing to challenge the proposed finding may submit factual or legal arguments and evidence to rebut the evidence relied upon. This material must be submitted within 120-days from the date of publication of this notice.

Under § 83.9(f) of the Federal regulations, a report summarizing the evidence for the proposed decision will be available to the petitioner and interested parties upon written request. Comments and requests for a copy of the report should be addressed to the Office of the Assistant Secretary—Indian Affairs, 1849 C Street, NW., Washington, DC 20240, Attention: Branch of Acknowledgment and Research, Mail Stop 4627-MIB.

After consideration of the written arguments and evidence rebutting the proposed finding and within 60 days after the expiration of the 120-day response period, the Assistant Secretary will publish the final determination regarding the petitioner's status in the Federal Register as provided in § 83.9(h).

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 90-16925 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-02-M

#### Public Hearing on Fiscal Year 1989 Plan for Services to Indian Infants and Toddlers With Handicaps and Their Families

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of public hearings and comment period.

**SUMMARY:** The Office of Indian Education Programs (OIEP), Branch of Exceptional Education, announces public hearings and opportunity for public comment. The OIEP has completed the required application for Fiscal Year 1989 Funds under part H (Infants and Toddlers Program) of the Education of the Handicapped Act, Public Law 94-142 as Amended by Public Law 99-457 (section 678). The application, which will be submitted to the Department of Education, Office of Special Education Programs, describes the major activities which will be implemented by the BIA/OIEP in planning, developing, and implementing a system of early intervention services for Indian infants and toddlers with handicaps and their families located on reservations served by the elementary and secondary schools operated for Indians by the Department of the Interior. Fiscal year 1989 funds are available for obligation by the Bureau of Indian Affairs (BIA) from the date the award is made by the U.S. Department of Education through September 30, 1991.

The Bureau's application is available for review and public comment to all interested parties and members of the general public. Copies of the application may be obtained from BIA Area/Agency Education Offices or from the Branch of Exceptional Education.

The OIEP will conduct three public hearings on the application to provide an opportunity for comments by the general public. Interested persons may present oral testimony or file written statements. All written statements must be received at the Bureau of Indian Affairs no later than August 23, 1990. Written comments should be sent to: Bureau of Indian Affairs, Office of Indian Education Programs, Branch of Exceptional Education, MS 3525 MIB Code 523, 1849 C Street NW., Washington, DC 20240.

**DATES AND TIMES:**

July 23, 1990, 1:30 p.m. until 4:30 p.m. and 5:30 p.m. until 8:30 p.m. in Phoenix, Arizona.

July 24, 1990, 5:30 p.m. until 8:30 p.m. and July 25, 1990, 9 a.m. until 12:00 noon in Seattle, Washington.

July 26, 1990, 9 a.m. until 12:00 noon and 5:30 p.m. until 8:30 p.m. in Sioux Falls, South Dakota. (Local time at each site.)

**ADDRESSES:** Hearing locations:

Doubletree Suites at Phoenix Gateway Center, 320 North 44th Street, Phoenix, AZ, 602-225-0500.

Quality Inn SEA-TAC, 3000 South 176th Street, Seattle, WA 206-246-9110.

Best Western Ramkota Inn, 2400 North Louise Avenue, Sioux Falls, South Dakota, 605-336-0650.

**FOR FURTHER INFORMATION CONTACT:** Goodwin K. Cobb III, Chief, Branch of Exceptional Education or Carol L. Zilka, Education Specialist, Early Childhood Program, Office of Indian Education Programs, Bureau of Indian Affairs, Telephone: (202) 208-6675 or FTS 268-6675.

Dated: July 2, 1990.  
Edward F. Parisian,  
Deputy to the Assistant Secretary, Director,  
Indian Education Programs.  
[FR Doc. 90-16802 Filed 7-18-90; 8:45 am]  
BILLING CODE 4310-22-M

**Bureau of Land Management**

[AK-963-4230-15; AA-39615]

**Alaska Native Claims Selection**

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of section 14(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(f), will be issued to Bethel Native Corporation for approximately 28.50 acres. The lands involved are in the vicinity of Bethel, Alaska.

Sec. 12, T. 8 N., R. 72 W., Seward Meridian, Alaska.

A notice of the decision will be published once a week, for four (4) consecutive weeks, in the TUNDRA DRUMS. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7599 [(907) 271-5960].

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until August 20, 1990 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart

E, shall be deemed to have waived their rights.

Ann Johnson,  
Chief, Branch of Calista Adjudication.  
[FR Doc. 90-16856 Filed 7-18-90; 8:45 am]  
BILLING CODE 4310-JA-M

[AZ040-09-4332-02] **Notice of Meeting for Safford District Advisory Council**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Notice is hereby given in accordance with Public Law 94-579 and 43 CFR Part 1780, that a meeting of the Safford District Advisory Council will be held.

**DATES:** Friday, August 24, 1990; 10 a.m.

**ADDRESSES:** Amerind Foundation near Dagoon, Arizona.

**FOR FURTHER INFORMATION CONTACT:** Cindy Alvarez, Planning and Environmental Coordinator, Safford District, 425 E. 4th Street, Safford, AZ 85546. Telephone (602) 428-4040.

**SUPPLEMENTARY INFORMATION:** The agenda for the meeting includes the following items:

1. Review of RMP comments and initial responses.
2. Develop a wilderness strategy for the District.
3. Tres Alamos Cooperative Agreement.
4. Tour of Amerind Foundation facilities.
5. District update.

The meeting will begin at 10 a.m. at the Amerind Foundation near Dagoon, Arizona. The meeting will be open to the public. Interested persons may make oral statements to the Council between 1 p.m. and 2 p.m. or may file written statements for consideration by the Council. Anyone wishing to make an oral statement must notify the District Manager, by Thursday, August 23, 1990. Depending upon the number of people wishing to make oral statements, a per person time limit may be considered.

Summary minutes of the Board meeting will be maintained in the District Office and will be available for public inspection and reproduction (during business hours) within thirty (30) days following the meeting.

Dated: July 11, 1990.  
Frank Rowley,  
Acting District Manager.  
[FR Doc. 90-16857 Filed 7-18-90; 8:45 am]  
BILLING CODE 4310-32-M

**Dunn County, ND; Resource Management Plan Amendment**

[MT-030-00-4351-08]

**AGENCY:** Bureau of Land Management, Dickinson District Office, Interior.**ACTION:** Notice of intent to prepare a resource management plan amendment for a proposed bighorn sheep transplant in Dunn County, North Dakota.**SUMMARY:** A Resource Management Plan Amendment/Environmental Assessment will be prepared on a proposal to transplant bighorn sheep on Public Domain located in T. 148 N., R. 96 and 97 W., Fifth Principal Meridian.

The North Dakota Resource Management Plan (1988) did not specifically address transplanting bighorn sheep in the area noted above. The amendment and environmental assessment are being done to analyze the site specific environmental effects of the proposed action.

The action will entail coordination with the North Dakota Game and Fish Department, the USDA Forest Service and scoping contacts with interested and/or affected parties.

**DATES:** A public scoping period will begin on July 19, 1990 and end 30 days later on August 30, 1990.**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, Attention: Terry Rich, 2933 Third Avenue West, Dickinson, North Dakota 58601, Phone: (701)/225-9148.

Dated: July 11, 1990

William F. Krech,

District Manager.

[FR Doc. 90-16858 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-DN-M

[CA-060-09-4212-13; CA-27257]

**Exchange of Public and Private Lands, Riverside County, CA; Notice of Realty Action****AGENCY:** Bureau of Land Management, Interior.**ACTION:** Notice of realty action; exchange of public and private lands, CA-27257.**SUMMARY:** The following described public lands, located in Riverside County, are being considered for disposal by exchange under Section 206 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1716):

San Bernardino Meridian, California

T. 6 S., R. 5 W.;

Sec. 4: lots 1-4.

Containing 79.88 acres, more or less.

In exchange for these lands the United States will acquire from The Nature Conservancy certain offered private lands in the Steele Peak Stephens' Kangaroo Rat Reserve, which will be described in a subsequent Notice of Realty Action. The selected public land would be patented to The Nature Conservancy pursuant to a land exchange pooling agreement between The Nature Conservancy and the Bureau of Land Management.

**SUPPLEMENTARY INFORMATION:** The purpose of this exchange is to acquire non-Federal lands within the Steele Peak Stephens' Kangaroo Rat Reserve project area, as that area is described in the "Final Environmental Impact Statement and Environmental Impact Report, section 10(a) Permit to Allow Incidental Take of the Endangered Stephen's Kangaroo Rat in Riverside County, California, March 1990." The Steele Peak Reserve area contains habitat which supports the Federally listed endangered species, Stephens' Kangaroo Rat.

The Bureau of Land Management has entered into a land exchange pooling agreement with the Nature Conservancy to acquire non-Federal lands through a series of land exchanges to occur within the next two years until the values of the offered and selected lands reach equal fair market value as described by regulation. Full equalization of values will be achieved through either acreage adjustment or by cash payment in an amount not to exceed 25% of the value of the lands being transferred out of Federal ownership at the conclusion of the exchange process.

Additional Notices of Realty Action will be published identifying all specific additional offered private lands and selected public lands being considered under the Steele Peak land exchange pooling agreement.

The purpose of this exchange is to dispose of an isolated parcel of public land and acquire non-Federal lands within the Steele Peak Stephens' Kangaroo Rat Reserve. These acquired non-Federal lands will provide additional habitat for an endangered species and will enhance the Bureau of Land Management's ability to manage the area by consolidating land ownership. The public interest will be served by completing this exchange.

The lands to be transferred from the United States will be subject to the following patent reservations:

1. A reservation to the United States of a right-of-way for ditches and canals constructed by the authority of the United States; Act of August 30, 1890 (26 Stat. 291; 43 U.S.C. 945).

2. (a) A reservation to the United States of all the geothermal steam and associated geothermal resources in the lands so patented subject to disposition under the Geothermal Steam Act.

(b) The United States reserves to itself, its permittees, licensees, and lessees, the right to prospect for, mine and remove the geothermal steam and associated geothermal resources owned by the United States under applicable law and such regulations as the Secretary of the Interior may prescribe. This reservation includes all necessary and incidental activities conducted in accordance with the provisions of the geothermal leasing laws in effect at the time such activities are undertaken, including, without limitation, necessary access and exit rights, all drilling and storage and transportation facilities deemed necessary and authorized under law and implementing regulations.

(c) Unless otherwise provided by separate agreement with the surface owner, permittees, licensees, and lessees of the United States shall reclaim disturbed areas to the extent prescribed by regulations issued by the Secretary of the Interior.

(d) All causes of action brought to enforce the rights of the surface owner under the regulations above referred to shall be instituted against permittees, licensees, and lessees of the United States; and the United States shall not be liable for the acts of omission of its permittees, licensees, or lessees.

Publication of this notice in the Federal Register segregates the public lands from the operation of the public land laws and the mining laws, except for mineral leasing. This segregative effect will expire upon issuance of patent or two (2) years from the date of publication, whichever occurs first.

For detailed information concerning this exchange contact Russell L. Kaldenberg, BLM Palm Springs-South Coast Resource Area, at (619)-323-4421, or 400 S. Farrell, Suite B205, Palm Springs, CA 92262.

For a period of 45 days after publication of this notice in the Federal Register, interested parties may submit comments to the District Manager, California Desert District, 1695 Spruce Street, Riverside, CA 92507. Any adverse comments will be evaluated by the State Director, who may vacate or modify this realty action and issue a final determination. In the absence of any adverse comments, this realty action will become the final determination of the Department of the Interior.

Dated: July 10, 1990.

H.W. Riecken,

Acting District Manager.

[FR Doc. 90-16859 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-40-M

[CA-050-4212-14; CA 24024]

**Correction to Notice of Realty Action;  
Noncompetitive Sale of Public Lands  
in Siskiyou County, CA**

**SUMMARY:** The Summary portion of the Notice of Realty Action, published on page 53762 of the Federal Register, Volume 54, No. 249, on December 29, 1989, is hereby corrected as follows:

The fair market value has been established at \$25,250.

All other terms and conditions of the previous Notice remain unchanged. Questions regarding this correction may be directed to: Redding Resource Area Office, Bureau of Land Management, 355 Hemsted Drive, Redding, CA 96002.

Mark Morse,

Area Manager.

[FR Doc. 90-16860 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-40-M

[WY-930-00-4212-14; W-89551]

**Realty Action; Direct Sale of Public  
Lands; Wyoming**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of realty action, sale of public lands in Lincoln County.

**SUMMARY:** The Bureau of Land Management has determined that the lands described below are suitable for public sale under section 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713:

Sixth Principal Meridian

T. 26 N., R. 113 W.,  
T. Sec. 7, NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ ,  
N $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ .

The above lands aggregate 3.75 acres.

**FOR FURTHER INFORMATION CONTACT:** David Harper, Realty Specialist, Bureau of Land Management, Pinedale Resource Area, P.O. Box 768, Pinedale, Wyoming 82941, 307-367-4358.

**SUPPLEMENTAL INFORMATION:** The Bureau of Land Management proposes to sell the surface estates, reserving all the minerals to the United States. The land is to be sold to the San Sallie Estate, LaBarge, Wyoming, pursuant to section 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713. The San Sallie Estate wishes to acquire the lands which contain historic

and contemporary structures that were accidentally built on public lands.

The proposed direct sale to the San Sallie Estate would be made at fair market value.

The proposed sale is consistent with the Pinedale Resource Area Management Plan and would serve important public objectives which cannot be achieved prudently or feasibly elsewhere. The land contains no known public values. The planning document and environmental assessment/land report covering the proposed sale will be available for review at the Bureau of Land Management, Pinedale Resource Area Office, Pinedale, Wyoming.

Conveyance of the public land will be subject to:

1. Reservation of a right-of-way for ditches or canals pursuant to the Act of August 30, 1890, 43 U.S.C. 945.

2. Reservation of all minerals to the United States of America.

3. Oil and gas lease BLM serial number WYW-80929.

4. Those rights for a telephone right-of-way as have been granted to Mountain Bell Telephone Company.

The public lands described above shall be segregated from all forms of appropriation under the public land laws, including the mining laws upon publication of this notice in the Federal Register. The segregative effect will end upon issuance of the patent or 270 days from the date of the publication, whichever comes first.

For a period of forty-five (45) days from the date of issuance of this notice, interested parties may submit comments to the Bureau of Land Management, District Manager, Rock Springs, P.O. Box 1869, Rock Springs, Wyoming 82901. Any adverse comments will be evaluated by the State Director who may sustain, vacate, or modify this realty action. In the absence of any objections this proposed realty action will become final.

Dated: July 10, 1990.

David E. Harper,

Acting Area Manager.

[FR Doc. 90-16861 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-22-M

**Restriction of Use on Public Lands;  
Lassen County, CA**

**AGENCY:** Bureau of Land Management, Department of the Interior.

**ACTION:** Emergency restriction of use on public lands; Lassen County, California.

**SUMMARY:** Notice is hereby given that all public use of selected public lands adjacent to the Sierra Army Depot is

restricted until September 15, 1990.

Access to these lands is limited to the authorized personnel from the Departments of Defense and Interior on official business. This restriction is necessary to ensure public safety and allow the US Army to locate and dispose of live and inert ordnance on public lands adjacent to the Sierra Army Depot.

**DATES:** This restriction of use goes into effect on July 12, 1990 and shall remain in effect through September 15, 1990.

**FOR FURTHER INFORMATION CONTACT:** Dick Stark, Area Manager, Eagle Lake Resource Area, 2545 Riverside Drive, Susanville, California 96130. Telephone: (916) 257-0456.

**SUPPLEMENTARY INFORMATION:** The authority for this restriction is 43 CFR 8364.1. Any person who fails to comply with this order restricting uses is subject to arrest and fine of up to \$1,000 and/or imprisonment not to exceed 12 months. This closure applies to all the public except authorized personnel from the Departments of Defense and Interior.

The public lands affected by this order are described as follows:

Mount Diablo Meridian

T. 26N., R. 16E.

Section 1, E $\frac{1}{2}$ ;

Section 12, E $\frac{1}{2}$ .

T. 28N., R. 17E.

Sections 1, 2, 3, 6, 7, 10, 11, 14, 15, 18, 22, 23 west of Skedaddle Road.

T. 29N., R. 16E.

Section 36, all.

T. 29N., R. 17E.

Sections 26-30, all;

Sections 31-36, all.

Robert J. Sherve,

Associate District Manager.

[FR Doc. 90-16918 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-40-M

[7150-09-ZCAB]

**Intent To Prepare an Environmental  
Impact Statement on a Proposed  
Nahcolite Solution Mine/Sodium  
Bicarbonate Production Plant,  
Colorado**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent to prepare an environmental impact statement (EIS) on a mine development plan for solution mining of nahcolite and the production of sodium bicarbonate in northwestern Colorado and notice of public scoping meeting.

**SUMMARY:** Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the Bureau of Land

Management, White River Resource Area, Craig District, will prepare an EIS on the impacts of Denison Resources (USA) Corporation mine development plan for a proposed nahcolite solution mine/sodium bicarbonate production facility on public land in Rio Blanco County located in northwestern Colorado.

**DATES:** Written comments will be accepted until August 31, 1990. A public scoping meeting will be held at 7 p.m. on August 15, 1990 at the White River Resource Area Office on State Highway 64 at Meeker, Colorado. Additional briefing meetings will be considered as appropriate.

**ADDRESSES:** Written comments should be sent to the Area Manager, Bureau of Land Management, White River Resource Area, Post Office Box 928, Meeker, Colorado 81641-0928, Attention: Denison Resources EIS Project.

**FOR FURTHER INFORMATION CONTACT:** Gary Thrash (303) 878-3601.

**SUPPLEMENTARY INFORMATION:** The mine development plan submitted by Denison Resources (USA) Corporation (Denison) proposes the extraction and processing of sodium resources from Sodium Lease C-0119985 located in Township 1 South, Range 98 West, 6th P.M., Sections 19, 20, 21, 29 and 30, Rio Blanco County, Colorado. This action is being considered under the provisions of the Mineral Leasing Act of 1920, as amended and pursuant to the regulations in 43 CFR Part 3592.

The proposed action involved a phased development with initial production of nahcolite at a rate of 30,000 tons/year for the first year. Production would be increased to 50,000 tons/year in approximately the third year of operation with an expected total mine life of 30 years. The proposed project includes: a well field for in-situ solution mining of nahcolite, a handling and processing plant, evaporation ponds, associated transportation, access and support facilities. Siting of the proposed plant and well field would encompass approximately 97 acres of public land.

The EIS is intended to evaluate project alternatives, identify impacts to the human environment, identify mitigating measures and special stipulations that would be incorporated into the approved plan. Alternatives that have been tentatively identified include the following: (1) The No Action Alternative, (2) the Proposed Action, (3) a 125,000 Tons/Year Production Alternative, and (4) a 500,000 Tons/Year Production Alternative. Potential issues include hydrology, oil shale and solution mining buffer zones.

The tentative EIS schedule is as follows:

Begin Public Comment Period—July, 1990

Draft EIS Issued—March, 1991

Final EIS Issued—October, 1991

Record of Decisions Issued—December, 1991

The Bureau of Land Management's scoping process for the EIS will include: (1) Identification of issues to be addressed, (2) identification of viable alternatives and (3) notifying interested groups, individuals and agencies so that additional information concerning these issues can be obtained.

The scoping process will consist of a news release announcing the start of the EIS process, letters of invitation to participate in the scoping process, and a scoping document which further clarifies the proposed action, alternatives and significant issues being considered to be distributed to selected parties and available upon request.

Dated: July 12, 1990.

Tom Walker,

Associate State Director.

[FR Doc. 90-18919 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-JE-M

[UT-060-00-4214-11; UTU-64646]

### Realty Action; Emery County, UT

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action, UTU-64646, Noncompetitive (Direct) Sale and Competitive Sale of Public Land in Emery County, Utah.

**SUMMARY:** Notice is given that the following described parcel of public land has been examined and through the development of local land-use planning decisions based upon public input, resource considerations, regulations and Bureau policies, has been found suitable for disposal by sale pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA) (90 Stat. 2750; 43 U.S.C. 1713). The following parcel of land will be sold to Green River City using noncompetitive (direct) sale procedures (43 CFR 2711.3-3):

Salt Lake Meridian, Utah

T. 21 S., R. 16 E.,

Sec. 7, N2SE4.

Encompassing 80.0 acres.

The following parcel will be offered as a competitive sale in accordance with 43 CFR 2711.3-1:

Salt Lake Meridian, Utah

T. 21 S., R. 16 E.,

Sec. 7, lot 3 (36.73 ac.), lot 4 (36.77 ac.),

S2NE4 (80.0 ac.), SE4NW4 (40.0 ac.),

E2SW4 (80.0 ac.),

Sec. 8, SW4NW4 (40.0 ac.).

Encompassing 313.50 acres.

The land will not be offered for sale until at least sixty (60) days after publication of this notice. The 80.0 acre parcel will be sold at the appraised fair market value of \$16,000.00. The 313.50 acre parcel will be sold at no less than the appraised fair market value of \$35,000.00.

Publication of this notice in the Federal Register segregates the public land from the operation of the public land laws and the mining laws. The segregative effect will end upon issuance of a patent, or two hundred seventy (270) days from the date of the publication, whichever occurs first.

The terms and conditions applicable to the sale are:

1. All minerals, including oil and gas, shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.

2. A right-of-way will be reserved for ditches and canals constructed by the authority of the United States (Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945).

3. The United States would reserve a 10 foot wide right-of-way UTU-66134 for an existing stock fence.

4. The patent would be subject to the following rights of record:

a. Telephone Line right-of-way UTSL-042141, 10 feet wide.

b. Railroad right-of-way UTSL-034773, 200 feet wide.

c. Powerline right-of-way UTU-21372, 100 feet wide.

**Sale Procedures:** Sealed bids will be accepted at the Price River Resource Area Office, 900 North 700 East, Price, Utah 84501 during regular business hours, 7:45 a.m. to 4:30 p.m. until September 18, 1990. The lands will be offered for sale at 10:00 a.m. MDT on September 25, 1990. Bid envelopes must be marked on the right front corner with "Bid for Public Sale," sale case number (UTU-64646), and sale date (September 25, 1990). Bids must be at not less than the appraised fair market value specified in this notice. Each sealed bid must be accompanied by a certified check, postal money order, or cashier's check made payable to Department of the Interior-BLM for not less than ten (10) percent of the amount bid. A statement as to the amount of the full bid shall be enclosed. The successful bidder shall submit the remainder of the full purchase price prior to the expiration of one hundred eighty (180) days from date of the sale. If the lands

are not sold on the sale date, they will remain for sale over the counter until sold or withdrawn from the market.

**Bidder Qualifications:** Bidders must be U.S. citizens, 18 years of age or more; a State or State instrumentality authorized to hold property; a corporation authorized to hold property; or a corporation authorized to own real estate in the State of Utah.

**Bid Standards:** The BLM reserves the right to accept or reject any and all offers or withdraw the land from sale if, in the opinion of the Authorized Officer, consummation of the sale would not be fully consistent with section 203(g) of FLPMA or other applicable laws.

**DATES:** For a period of forty-five (45) days from the date of publication of this notice in the *Federal Register*, interested parties may submit comments to the Moab District Manager, Bureau of Land Management, P.O. Box 970, Moab, Utah 84532. Objections will be reviewed by the Utah State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

**SUPPLEMENTARY INFORMATION:**

Additional information concerning the lands and the terms and conditions of the sale may be obtained from Mark Mackiewicz, Area Realty Specialist, Price River Resource Area, 900 North 700 East, Price, Utah 84501, (801) 637-4584, or from Brad Groesbeck, District Realty Specialist, Moab District Office, 82 East Dogwood, P.O. Box 970, Moab, Utah 84532, (801) 259-6111.

Dated: July 13, 1990.

Kenneth V. Rhea,  
Acting District Manager.

[FR Doc. 90-16921 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-DQ-M

[UT-942-00-5700-11; UTU-64644]

**Realty Action; Emery County, UT**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action, UTU-64644, Noncompetitive (Direct) Sale of Public Land in Emery County, Utah.

**SUMMARY:** Notice is given that the following described parcel of public land has been examined and through the development of local land-use planning decisions based upon public input, resource considerations, regulations and Bureau policies, has been found suitable for disposal by sale pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA) (90 Stat. 2750; 43 U.S.C. 1713) using

noncompetitive (direct) sale procedures (43 CFR 2711.3-3):

Salt Lake Meridian, Utah

T. 16 S., R. 9 E.,

Sec. 24, lot 1.

The described land aggregates 36.77 acres.

The land is being offered as a noncompetitive (direct) sale in accordance with 43 CFR 2711.3-3 to Mr. Ellis Willson of Wellington, Utah. The land will not be offered for sale until at least sixty (60) days after publication of this notice. The sale will be at no less than the appraised fair market value of \$5500.

Publication of this notice in the *Federal Register* segregates the public land from the operation of the public land laws and the mining laws. The segregative effect will end upon issuance of a patent, or two hundred seventy (270) days from the date of the publication, whichever occurs first.

The terms and conditions applicable to the sale are:

1. All minerals, including oil and gas, shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.

2. A right-of-way will be reserved for ditches and canals constructed by the authority of the United States (Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945).

3. A right-of-way will be reserved for Federal Aid Highway UTU-00178.

The sale of land will be subject to all valid existing rights and reservations of record. Existing rights and reservations of record include, but are not limited to, federal oil and gas lease UTU-65300, powerline right-of-way UTU-53812, water pipeline right-of-way UTU-16680, and telephone line right-of-way UTU-53808.

**Sale Procedures:** The buyer will be required to submit ten (10) percent of the fair market value of the property on the date the property is offered for sale.

The remainder of the full purchase price shall be submitted prior to the expiration of one hundred eighty (180) days from date of the sale. The land will be offered for sale at 10:00 a.m. MDT on September 25, 1990 at the Price River Resource Area Office. If the lands are not sold on the sale date, they will remain for sale over the counter until sold or withdrawn from the market. Over-the-counter bidder qualifications are noted below.

**Bidder Qualifications:** Bidders must be U.S. citizens, 18 years of age or more; a State or State instrumentality authorized to hold property; a corporation authorized to hold property; or a corporation authorized to own real estate in the State of Utah.

**Bid Standards:** The BLM reserves the right to accept or reject any and all offers or withdraw the land from sale if, in the opinion of the Authorized Officer, consummation of the sale would not be fully consistent with section 203(g) of FLPMA or other applicable laws.

**DATES:** For a period of forty-five (45) days from the date of publication of this notice in the *Federal Register*, interested parties may submit comments to the Moab District Manager, Bureau of Land Management, P.O. Box 970, Moab, Utah 84532. Objections will be reviewed by the Utah State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

**SUPPLEMENTARY INFORMATION:**

Additional information concerning the lands and the terms and conditions of the sale may be obtained from Mark Mackiewicz, Area Realty Specialist, Price River Resource Area, 900 North 700 East, Price, Utah 84501, (801) 637-4584, or from Brad Groesbeck, District Realty Specialist, Moab District Office, 82 East Dogwood, P.O. Box 970, Moab, Utah 84532, (801) 259-6111.

Dated: July 13, 1990.

Kenneth V. Rhea,  
Acting District Manager.

[FR Doc. 90-11922 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-DQ-M

[UT-060-00-4214-11; UTU-64644, UTU-64646]

**Final Decision on Plan Amendment for Price River Resource Area Management Framework Plan**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final decision on plan amendment for price river resource area management framework plan.

**SUMMARY:** Notice is given to the public that the Bureau of Land Management has made a final decision to amend the Price River Resource Area Management Framework Plan. The plan amendment will read:

Allow disposal through sale of the following described parcels of public land:

Public Land Sale UTU-64646  
Total acreage 36.77

Salt Lake Meridian, Utah

T. 16 S., R. 9 E.,

Sec. 24, lot 1.

Public Land Sale UTU-64644

Total acreage 393.50

**Salt Lake Meridian, Utah**

T. 21 S., R. 16 E.,

Sec. 7, lot 3 (36.79 ac.), lot 4 (36.77 ac.).

S2NE4 (80.0 ac.), SE4NW4 (40.0 ac.).

E2SW4 (80.0 ac.), N2SE4 (80.0 ac.).

Sec. 8, SW4NW4 (40.0 ac.).

**DATES:** For 30 days from the publication of this notice, protests on the plan amendment may be filed. This decision will become final after the 30-day period if no protests are received.

**ADDRESSES:** Protests on the plan amendment may be sent to the Director, Bureau of Land Management, 18th and C Street NW, Washington, DC 20240. For further information please contact: Mark Mackiewicz, Area Realty Specialist, Price River Resource Area, 900 North 700 East, Price, Utah 84501 (801) 637-4584, or Brad Groesbeck, District Realty Specialist, Moab District Office, 82 East Dogwood, P.O. Box 970, Moab, Utah 84532, (801) 259-6111.

Dated: July 2, 1990.

James M. Parker,

State Director.

[FR Doc. 90-16920 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-DQ-M

**Fish and Wildlife Service****Public Hearings on Draft Long-Range Plan of the Klamath River Restoration Program**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of public hearings on review draft.

**SUMMARY:** This notice announces the public hearings on the draft long-range plan (Plan) of the Klamath River Restoration Program, a 20 year program to restore anadromous fish populations and habitats of the Klamath River Basin, in California and Oregon. Draft copies of the Plan have been distributed to agencies, Tribes, libraries, and interested groups. Persons wishing to review the Plan may do so at locations listed below under **ADDRESSES**. Public hearings will be held on the following dates and times at respective locations:

1. July 25, 1990, at 7 p.m. at the Yreka Community Center, 810 North Oregon Street, Yreka, CA;

2. July 26, 1990, at 7 p.m. at the North Coast Inn, 4975 Valley West Blvd., Arcata, CA;

3. July 27, 1990, at 7 p.m. at the Weitchpec School, located 2 miles north of the Weitchpec bridge on Highway 98, Weitchpec, CA;

4. July 28, 1990, at 12 noon, at the Klamath Yurok Transition Team Office, 15900 Highway 101 North, Klamath, CA.

Members of the Klamath River Basin Fisheries Task Force, an advisory committee providing guidance on conduct of the Restoration Program, will attend the public meetings to hear comments.

**DATES:** Comments will be accepted through August 10, 1990. Written comments may be sent to the address indicated below under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** Copies of the complete Plan document will be available for review at the following locations, during normal business hours: **LIBRARIES:** Siskiyou County Public Library, 719 4th Street, Yreka, CA; Trinity County Public Library, 229 Main, Weaverville, CA; Humboldt County Public Library, 421 "T" Street, Eureka, CA; Del Norte County Public Library, 190 Price Mall, Crescent City, CA; Klamath County Public Library, Klamath Falls, OR; Happy Camp Branch Library, 143 Buckhorn Road, Happy Camp, CA; Orleans Elementary School Library, Orleans, CA; Weitchpec Store, Weitchpec, CA; Humboldt State University Library, Arcata, CA; Southern Oregon State College Library, Ashland, OR; **Federal Offices:** U.S. Fish & Wildlife Service, Klamath Field Office, 1030 South Main, Yreka, CA; U.S. Fish & Wildlife Service, Trinity River Field Office, #3 Horseshoe Square, Weaverville, CA; U.S. Fish & Wildlife Service, 1125 16th Street, Room 209, Arcata, CA; Six River National Forest, 500 5th Street, Eureka, CA; Gasquet Ranger District, Gasquet, CA; Orleans Ranger District, Orleans, CA; Lower Trinity Ranger District, Willow Creek, CA; Mad River Ranger District, Bridgeville, CA; Klamath National Forest Headquarters, 1312 Fairlane Road, Yreka, CA; Oak Knoll Ranger District, 22541 Highway 98, Klamath River, CA; Happy Camp Ranger District, Happy Camp, CA; Salmon River Ranger District, Etna, CA; Scott River Ranger District, Fort Jones, CA; Goosenest Ranger District, Orleans, CA; Klamath National Wildlife Refuge, Tulelake, CA; U.S. Fish & Wildlife Service, Regional Office, 1002 NE Holladay Street, Portland, OR; **Other Government Offices:** California Department of Fish & Game, 601 Locust Street, Redding, CA; Hoopa Valley Business Council, Hoopa, CA; Yurok Transition Team, 517 Third Street, #18, Eureka, CA; Klamath Tribal Office, Old Williamson Business Park, Hwy 97, Chiloquin, OR; Karuk Tribal Office, 746 Indian Creek Road, Happy Camp, CA.

**FOR FURTHER INFORMATION CONTACT:** Ronald A. Iverson, U.S. Fish & Wildlife

Service, Klamath Field Office, P.O. Box 1006, Yreka, CA, 96097. Phone 916/842-5763.

**SUPPLEMENTARY INFORMATION:** For further information on the Klamath River Basin Conservation Area Restoration Program, see 16 U.S.C. 460ss-ss6 (the "Klamath Act").

Dated: July 12, 1990.

David L. McMullen,

Acting Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 90-16917 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-55-M

**DEPARTMENT OF JUSTICE****Antitrust Division****Notice Pursuant to the National Cooperative Research Act of 1984—Petroleum Environmental Research Forum Project No. 88-05 in Situ Reclamation of Oily Pits**

Notice is hereby given that, on June 20, 1990, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the participants in Petroleum Environmental Research Forum Project No. 88-05, titled "In Situ Reclamation of Oily Pits," filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to Project No. 88-05 and (2) the nature and objectives of the project. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified conditions. Pursuant to section 6(b) of the Act, the identities of the parties participating in the project and the nature and objectives of the project are given below.

The participants in the project are the following: Amoco Oil Company; Atlantic Richfield Company; B P America; Chevron Research Company; Conoco, Inc.; Exxon Production Research Company; Murphy Oil USA, Inc.; Union Oil Company of California; Texaco, Inc. and Remediation Technologies, Inc.

The nature and objectives of this venture are to establish a joint effort to identify and describe appropriate methods for in situ remediation of oil pits, ponds and lagoons and present such data in the form of a guidance manual. The work will consist of the following technical tasks: to review all pertinent literature and information to identify all appropriate methods for in situ reclamation of oil pits, ponds and

lagoons; to focus on effectiveness and environmental acceptability; to develop a guidance manual which will allow professional engineers to effectively and safely practice the methods; to include in the manual necessary information to convince potential users and regulators that the processes will function effectively and safely if properly applied.

Participation in this project will remain open until termination of Project No. 88-05, and the participants intend to file additional written notification(s) disclosing all changes in membership of this project. Information regarding participation in this project may be obtained from Conoco, Inc., P.O. Box 1267, Ponca City, Oklahoma 74603.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 90-16872 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

#### **National Cooperative Research Act of 1984, Appliance Industry; Government CFC Replacement Consortium, Inc.**

Notice is hereby given that pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Appliance Industry-Government CFC Replacement Consortium, Inc. ("Corporation"), filed a written notification simultaneously with the Attorney General and the Federal Trade Commission on June 4, 1990 concerning the identities of additional members or participants of the Corporation. The written notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

The following have become additional members or participants of the Corporation: Sanyo E & E Corporation, 1201 Sanyo Road, San Diego, CA 92073 (effective March 26, 1990); Olin Urethane Systems, 5 Science Park, No., P.O. Box 30-275, New Haven, CT 06511 (effective April 25, 1990); Mobil Chemical Company, a division of Mobil Oil Corporation, P.O. Box 240, Edison, NJ 08818 (effective May 3, 1990); Monsanto Company, 730 Worcester, Springfield, MA 01151 (effective May 7, 1990); Exxon Chemical Company, 750 West Lake Road, Suite 400, Buffalo Grove, IL 60089-2069 (effective May 25, 1990); Tecumseh Products Company, 100 East Patterson Street, Tecumseh, MI 49286 (effective May 29, 1990).

No other changes have been made in either the membership or planned activity of the Corporation.

On September 19, 1989, the Corporation filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 1, 1989, 54 FR 46136.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 90-16867 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

#### **National Cooperative Research Act of 1984; Petroleum Environmental Research Forum**

Notice is hereby given that, on June 25, 1990, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Petroleum Environmental Research Forum ("PERF") filed a written notification simultaneously with the Attorney General and with the Federal Trade Commission disclosing a change in the membership of PERF. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, the notification stated that the following additional party has become a member of PERF: Alberta Energy Company Ltd., 2400, 639—5th Avenue, SW., Calgary, Alberta T2P OM9, Canada.

No other changes have been made in either the membership or the planned activities of PERF.

On February 10, 1986, PERF filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on March 14, 1986 (51 FR 8903). On May 6, 1986, May 27, 1986, June 23, 1986, February 3, 1989, March 21, 1989, October 31, 1989, and April 19, 1990, PERF filed additional written notifications. The Department published notices in the **Federal Register** in response to these additional notifications on June 9, 1986 (51 FR 20897), June 19, 1986 (51 FR 22365), July 17, 1986 (51 FR 25957), March 1, 1989 (54 FR 8607), April 20, 1989 (54 FR 16014), December 8, 1989 (54 FR 50661), and May 30, 1990 (55 FR 21951), respectively.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 90-16868 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

#### **National Cooperative Research Act of 1984; Petroleum Environmental Research Forum Project No. 88-04, Bioreclamation of Oily Soil**

Notice is hereby given that, on June 20, 1990, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the participants in Petroleum Environmental Research Forum Project No. 88-04, titled "Bioreclamation of Oily Soil," filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing a change in the membership of the parties to the project. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. The change consists of the addition of the following to the membership of the project:

Atlantic Richfield Company, 515 South Flower Street, Ap-3609, Los Angeles, California 90071.

Exxon Production Research Company, P.O. Box 2189, Houston, Texas 77252-2189.

Shell Development Company, 3333 Highway 6 South, P.O. Box 1380, Houston, Texas 77251-1380.

No other changes have been made in either the membership, the objectives or the planned activities of the venture.

On March 28, 1990, PERF filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 1, 1990, at 55 FR 18191.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 90-16869 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

#### **National Cooperative Research Act of 1984; Portland Cement Association**

Notice is hereby given that, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the Portland Cement Association ("PCA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission on June 15, 1990, disclosing that there have been changes in the membership of PCA. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Boliden-Allis, Inc., effective April 1, 1990, and Westvaco Corporation,

effective June 1, 1990, have become participating associates.

No other changes have been made in either the membership or planned activities of PCA.

On January 7, 1985, PCA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice (the "Department") published a notice in the Federal Register pursuant to section 6(b) of the Act on February 5, 1985 (50 FR 5015). On March 14, 1985, August 13, 1985, January 3, 1986, February 14, 1986, May 30, 1986, July 10, 1986, December 31, 1986, February 3, 1987, April 17, 1987, June 3, 1987, July 29, 1987, August 6, 1987, October 9, 1987, February 18, 1988, March 9, 1988, March 11, 1988, July 7, 1988, August 9, 1988, August 23, 1988, January 23, 1989, February 24, 1989, March 13, 1989, May 25, 1989, July 20, 1989, August 24, 1989, September 25, 1989, December 14, 1989, January 31, 1990, and May 29, 1990, PCA filed additional written notifications. The Department published notices in the Federal Register in response to these additional notifications on April 10, 1985 (50 FR 14175), September 16, 1985 (50 FR 37594), November 15, 1985 (50 FR 47292), December 24, 1985 (50 FR 52568), February 4, 1986 (51 FR 4440), March 12, 1986 (51 FR 8573), June 27, 1986 (51 FR 23479), August 14, 1986 (51 FR 29173), February 3, 1987 (52 FR 3356), March 4, 1987 (52 FR 6635), May 14, 1987 (52 FR 18295), July 10, 1987 (52 FR 26103), August 26, 1987 (52 FR 32185), November 17, 1987 (52 FR 43953), March 28, 1988 (53 FR 9999), August 4, 1988 (53 FR 29397), September 15, 1988 (53 FR 35935), September 28, 1988 (53 FR 37883), February 23, 1989 (54 FR 7894), March 20, 1989 (54 FR 11455), April 25, 1989 (54 FR 17835), June 28, 1989 (54 FR 27220), August 23, 1989 (54 FR 35092), September 11, 1989 (54 FR 37513), October 20, 1989 (54 FR 43146), February 1, 1990 (55 FR 3497), March 7, 1990 (55 FR 8204), and July 3, 1990 (55 FR 27518), respectively.

Joseph H. Widmar,  
Director of Operations, Antitrust Division.  
[FR Doc. 90-16870 Filed 7-18-90; 8:45 am]  
BILLING CODE 4410-01-M

#### Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on July 3, 1990, a proposed consent decree in *United States v. Ashland Ethanol, Inc., et al.*, Civil Action No. C-1-89-012, was lodged with the United States District Court for the Southern District of Ohio. The proposed consent decree resolves a judicial

enforcement action brought by the United States against the joint venture partnership South Point Ethanol and the four partners of South Point Ethanol, Ashland Ethanol, Inc., a wholly-owned subsidiary of Ashland Oil, Inc., Ohio Farm Bureau Synfuels Investment Co., a wholly-owned subsidiary of the Ohio Farm Bureau Federation, Publiker Gasohol, Inc., a wholly-owned subsidiary of Publiker Industries, and UGI Ethanol Development Corp., a wholly-owned subsidiary of UGI, Corp., for violations of the Clean Water Act (the "Act").

The proposed consent decree requires the defendants to pay a civil penalty of \$627,000. The consent decree provides that the defendants shall pay \$200,000 within 30 days of entry of the decree, and make three subsequent annual payments of \$125,000, \$150,000 and \$152,000, plus the interest on each of these annual payments.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Ashland Ethanol, Inc., et al.* D.J. 90-5-1-1-3179.

The proposed consent decree may be examined at the office of United States Attorney, 100 East Fifth Street, Cincinnati, Ohio and at the office of Regional Counsel, Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois.

Copies of the consent decree may be examined at the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, room 1647, Ninth and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed consent decree may be obtained in person or by mail from the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice. Richard B. Stewart,

Assistant Attorney General, Environmental and Natural Resources Division.  
[FR Doc. 90-16862 Filed 7-18-90; 8:45 am]  
BILLING CODE 4410-01-M

#### Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on July 9, 1990 a proposed Consent Decree in *U.S. v. Colorado Refining Company*, Civil Action No. 90-

M-1197 (D. Colo.), was lodged with the United States District Court for the District of Colorado. The Consent Decree concerns alleged violations of the defendant's Prevention of Significant Deterioration ("PSD") permit enforceable under section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b). The defendant allegedly violated its PSD permit by: (a) Not reporting excessive H<sub>2</sub>S emissions in "units of the standard" as specified in the permit; (b) not certifying a continuous emissions monitoring ("CEM") system within the time frame required by the permit and in accordance with a protocol submitted to and approved by the U.S. Environmental Protection Agency ("EPA"); (c) not implementing a quality control ("QC") program for the CEM acceptable to EPA within the time period specified by the PSD permit; and (d) failing to notify EPA of excessive H<sub>2</sub>S emissions for the period from March 11 to 22, 1988. The Decree requires defendant to comply with its PSD permit and to pay a civil penalty of \$90,000.00.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *U.S. v. Colorado Refining Company*, D.J. No. 90-5-2-1-1356.

The proposed Consent Decree may be examined at the office of the United States Attorney for the District of Colorado, 633 17th Street, suite 1800, Denver, CO 80202 and the U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Denver, CO 80202-2405. The Decree may also be examined at the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, room 1515, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of \$1.20 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Richard B. Stewart,  
Assistant Attorney General, Environment and Natural Resources Division.  
[FR Doc. 90-16863 Filed 7-18-90; 8:45 am]  
BILLING CODE 4410-01-M

### Notice of Lodging of Consent Judgment Pursuant to Clean Air Act

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on July 3, 1990, a proposed Consent Judgment in *United States v. Golden Gate Petroleum Co.*, Civil Action No. C 89-1505-JPV, was lodged with the United States District Court for the Northern District of California. Under the proposed Consent Judgment, defendants Golden Gate Petroleum, Golden Gate International and Dennis O'Keefe will pay a civil penalty of \$1,000,000. In that action, pursuant to section 211(d) of the Clean Air Act, 41 U.S.C. 7545(d), the United States sought injunctive relief and civil penalties for the defendants' substantive and reporting violations of the Lead Phasedown Regulations, 40 CFR part 80, promulgated under section 211 of the Clean Air Act. The United States alleged that defendants violated regulations concerning banking of lead usage rights and lead usage or content restrictions, in addition to reporting regulations.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments concerning the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States v. Golden Gate Petroleum Co.*, D.J. Ref. No. 90-5-2-1-1338.

The proposed Consent Decree may be examined at any of the following offices: (1) The United States Attorney for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California (contact Assistant U.S. Attorney Frank Boone); (2) the U.S. Environmental Protection Agency, Western Field Office, 12345 W. Alameda, suite 300, Denver, Colorado (contact Marcia Cinley); or (3) the Environmental Enforcement Section, Environment & Natural Resources Division, U.S. Department of Justice, room 1541, 10th & Pennsylvania Avenue, NW., Washington, DC. Copies of the proposed Decree may be obtained by mail from the Environmental Enforcement Section of the Department of Justice, Environment and Natural Resources Division, P.O. Box 7611, Benjamin Franklin Station, Washington, DC 20044-7611, or in person at the U.S. Department of Justice Building, room 1541, 10th Street and Pennsylvania Avenue, NW., Washington, DC. Any request for a copy of the proposed Consent Decree should be accompanied

by a check for copying costs totalling \$1.20 (\$0.10 per page) payable to "United States Treasurer."

Richard B. Stewart,  
Assistant Attorney General, Environment &  
Natural Resources Division.

[FR Doc. 90-16864 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

### Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on July 5, 1990, a proposed Consent Decree in *United States v. G. Heileman Brewing Company* was lodged with the United States District Court for the Southern District of Illinois. The proposed consent decree resolves a judicial enforcement action brought by the United States against defendant Heileman for violations of the pretreatment requirements of the Clean Water Act at its Stag Brewery plant in Belleville, Illinois.

The consent decree requires Heileman to pay a civil penalty of \$325,000 for past violations of the Clean Water Act. The decree does not include any injunctive relief because the Stag Brewery plant discontinued operation in September, 1988, ending the violations, and the plant was thereafter dismantled.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. G. Heileman Brewing Company*, D.J. Ref. No. 90-5-1-1-3292.

The proposed consent decree may be examined at the office of the United States Attorney, Southern District of Illinois, 750 Missouri Avenue, East St. Louis, Illinois, or at the Region V office of the United States Environmental Protection Agency, Office of Regional Counsel, 230 South Dearborn Street, Chicago, Illinois 60604. Copies of the proposed consent decree may also be examined at the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, room 1515, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of \$.60 (six cents

per page reproduction cost) payable to the Treasurer of the United States.

Richard B. Stewart,  
Assistant Attorney General, Environment and  
Natural Resources Division.

[FR Doc. 90-16865 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

### Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

In accordance with Departmental policy, set out in 28 CFR 50.7, notice is hereby given that on June 28th, 1990, a proposed consent decree in settlement of the liability of County Sanitation District No. 2 of Los Angeles County, a publicly owned treatment works in Los Angeles County, California and an agent for other county sanitation districts signatory with District No. 2 in the agreement establishing the Joint Outfall System (hereafter "LACSD"). LACSD is a defendant in *United States and State of California v. Montrose Chemical Corporation of California, et al.*, Civil Action No. CV-90-3122 AAH(JRx) (CD Cal.). The Consent Decree with LACSD was lodged with the United States District Court for the Central District of California. The Amended Complaint in this suit seeks recovery, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for damages and response costs incurred by the United States and the State in connection with injury to natural resources for which the United States and the State are trustees. The proposed settlement provides that LACSD will provide support in the amount of approximately \$12 million over time for work to be performed in connection with the assessment of the natural resource damages resulting from releases of hazardous substances into the environment in and around the San Pedro Channel, the restoration or replacement of the resources injured by such releases, and the litigation against the remaining defendants.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044. Comments should refer to *United States v. Montrose Chemical Corporation of California*, D.J. Ref. No. 90-11-3-159.

The proposed Consent Decree may be examined at the Office of the United

States Attorney, Central District of California, U.S. Courthouse, 11th floor, 312 North Spring Street, Los Angeles, CA, at the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, room 1732(R), Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20044, and at the offices of the National Oceanic and Atmospheric Administration, Office of Regional Counsel, 300 South Ferry Street, Terminal Island, California. A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice.

The proposed consent decree may be examined at the Environmental Enforcement Section Document Center, 1333 F Street, NW., suite 600, Washington, DC 20004, 202-347-7829. A copy of the proposed consent decree may be obtained in person or by mail from the Document Center. In requesting a copy, please enclose a check in the amount of \$19.00 (25 cents per page reproduction costs) payable to Consent Decree Library.

Richard B. Stewart,

Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 90-16866 Filed 7-18-90; 8:45 am]

BILLING CODE 4410-01-M

## NATIONAL COMMISSION FOR EMPLOYMENT POLICY

### Meeting

**ACTION:** Notice of Meeting.

**SUMMARY:** Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463; 86 Stat. 770) notice is hereby given of a public meeting to be held in the Mendocino Room on the Executive Office Level of the San Francisco Marriott Fisherman's Wharf, 1250 Columbus Avenue, San Francisco, California 94133.

**DATES:** Monday, August 13, 1990, 8 a.m.-5 p.m.

**STATUS:** The meeting is to be open to the public.

**MATTERS TO BE DISCUSSED:** The purpose of this public meeting is to enable the Commission members to discuss progress on the research agenda, findings received from prior hearings, and budget and administrative matters.

**FOR FURTHER INFORMATION CONTACT:** Barbara C. McQuown, Director, National Commission for Employment Policy, 1522 K Street, NW., Suite 300, Washington, DC 20005, (202) 724-1545.

**SUPPLEMENTARY INFORMATION:** The National Commission for Employment Policy was established pursuant to Title IV-F of the Job Training Partnership Act (Pub. L. 97-300). The Act charges the Commission with the broad responsibility of advising the President, and the Congress on national employment issues. Handicapped individuals wishing to attend should contact the Commission so that appropriate accommodations can be made. Minutes of the meeting will be available for public inspection at the Commission's headquarters, 1522 K Street, NW., Suite 300, Washington, DC 20005.

Signed at Washington, DC, this 13th day of July 1990.

Barbara C. McQuown,

Director, National Commission for Employment Policy.

[FR Doc. 90-16927 Filed 7-18-90; 8:45 am]

BILLING CODE 4510-23-M

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Meeting of the National Council on the Arts

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the National Council on the Arts will be held on August 3, 1990 from 9 a.m. to 5:30 p.m., on August 4 from 9 a.m.-5:15 p.m. and on August 5 from 9 a.m. to 12 p.m. in room M09 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on Friday August 3 from 9 a.m. to 10:10 a.m., on Saturday, August 4, from 12:10 p.m. to 5:15 p.m. and on Sunday, August 5 from 9 a.m.-12 p.m. The topics for discussion will include Opening Remarks; Legislative Update; Report from International Committee; Institutional Grants—Seasonal Support versus Project Support; Fellowships—Career Development versus Project Support; Program Review/Guidelines for Museum Program, Theater Program, Locals Program; Challenge III, Inter-Arts: New Forms and Regional Initiative, Dance on Tour Initiative, and Music Fellowship Guidelines; and the AIDS Working Group Report.

The remaining sessions on Friday, August 3, from 10:10 a.m.-5:30 p.m. and on Saturday, August 4, from 9 a.m.-12:10 p.m. are for the purpose of Council review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the

Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants, and for discussion and development of confidential budgetary projections and related plans to be submitted to the Office of Management and Budget and the Congress. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c) (4), (6) and 9(B) of section 552(b) of title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5496 at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 90-16914 Filed 7-18-90; 8:45 am]

BILLING CODE 7537-01-M

### Meeting of National Council on the Arts

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the National Council on the Arts/National Assembly of State Arts Agencies/National Assembly of Local Arts Agencies Sub-committee to the National Council on the Arts will be held on August 2, 1990, from 2:30 p.m.-4 p.m. in room M07 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

This meeting will be open to the public on a space available basis. The topics for discussion will be policy issues.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National

Endowment for the Arts, Washington, DC 20508, or call (202) 682-5433.

Dated: July 12, 1990.

Yvonne M. Sabine,

Director, Council and Panel Operations,  
National Endowment for the Arts.

[FR Doc. 90-16923 Filed 7-18-90; 8:45 am]

BILLING CODE 7537-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-28197; File No. SR-MSRB-90-2]

### Self-Regulatory Organizations; Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on June 22, 1990, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Board is filing a proposed facility, namely, the operation of the Official Statement and Advance Refunding Document—Paper Submission system (OS/ARD) of the MUNICIPAL SECURITIES INFORMATION LIBRARY™ system or MSIL™ system (hereafter referred to as "the proposed rule change"). The Board requests that the Commission approve the proposed rule change by October 1, 1990, because, at that time, the Board hopes to begin the third and final phase of its development of the OS/ARD system during which it plans to choose one of the proposals from potential service providers for operation of the system.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below

and is set forth in sections (A), (B), and (C) below.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In the course of its rulemaking activities, the Board has observed a critical need for an improved flow of information about municipal securities issues into the market. The municipal securities market is quite diverse. At year-end 1989, there were approximately 1.1 million outstanding issues comprising \$740 billion in state and local government debt (excluding short-term notes). In 1989 alone, about 8500 issues comprising \$122.5 billion in state and local debt were issued. These issues include not only general obligation bonds, but revenue and conduit bonds as well. The features of many municipal securities have become quite complex. There are a wide variety of call provisions that operate under specified conditions. In addition, put provisions often contain preconditions which the holder must satisfy prior to exercising the put. The credit structures of these securities, particularly revenue and conduit bonds, also can be complex.

Board rules require dealers to explain to a potential customer all material facts about a proposed transaction, to recommend the transaction to the customer only if it is suitable for the customer and to price the transaction correctly. These requirements are for the protection of customers and are similar or identical to the requirements placed on dealers in other securities markets. However, it has become clear that dealers do not always have ready access to information on municipal securities necessary for them to meet these standards. Such information includes the official statement or OS (the only document which provides a complete, official description of the terms of the security which applies for the up to 40 year life of the security); advance refunding documents or ARDS (information regarding a change in the credit of the security brought about by an advance refunding) and continuing disclosure information or CDI (secondary market information regarding the securities or the credit of the issuer, such as an issuer's annual financial report or a trustee's report on the status of a structured financing).

Information about municipal securities exists. Under SEC Rule 15c2-12, issuers must prepare an OS for most issues over \$1 million. OSs also generally are voluntarily prepared for many issues under \$1 million. In addition, in recent years, more issuers

are following the suggestions of issuer and analyst groups and providing CDI. Finally, as noted above, trustees, pursuant to trust indentures for municipal securities issues, provide information to bondholders on the status of structured issues.

Such information, however, is not being made available to the market in any organized manner. Municipal securities are exempt from any Commission filing requirement. Thus, there is no central location containing a complete set of disclosure documents. Rule G-36 will enable the Board to collect OSs for most issues. They are available, however, only for review and copying in the Board's public access facility. OSs for issues subject to SEC Rule 15c2-12 also are being provided by underwriters to Nationally Recognized Municipal Securities Information Repositories ("NRMSIRs") in order to limit the period of time after the end of the underwriting period underwriters must provide the information to potential customers. However, Rule 15c2-12 does not apply to issues under \$1 million or certain private placements and short-term issues. Also, each NRMSIR does not necessarily have a complete set of OSs because underwriters may provide OSs to any of the three current NRMSIRs and there is no linkage among them. In addition, there is currently no central source of ARDs or CDIs. Finally, trustees often provide notice on the status of issues exclusively to bondholders, creating an opportunity for bondholders to buy or sell in advance of the news reaching the market.

The Board believes that improved access to information about municipal securities is important to the municipal securities market not only so that dealers can comply with the Board's fair practice rules, but also to enhance the integrity and efficiency of the market in general. When information is not readily available to the market, issuers may have to pay more in order to sell their securities. So too, in the secondary market, bonds are being priced on incomplete information. It is just as important to ensure a fair price to a customer purchasing a \$5,000 retirement home bond from a \$900,000 issue as it is to a customer purchasing a \$5,000 state general obligation bond. Such market inefficiencies are costly to all market participants—issuers, dealers, and investors.

Because of the Board's role as the primary industry regulator, it has been asked to address a number of problems which touch on the activities of dealers, but which also relate to the municipal

securities market in a more general manner. Examining these problems has involved numerous communications with diverse parties, including investors, issuers, dealers, bond trustees, bond insurance companies, registered securities clearing agencies and others. In addition to the information which comes to the Board through these channels, the dealer representatives, investor representatives, issuer representatives and other public representatives who have served on the Board also have brought their own expertise to address factors which affect the integrity and efficiency of the market. The Board has seen that market inefficiencies and other disclosure problems often result when market participants do not have ready access to official information about municipal securities issues.

The Board believes that the municipal securities market needs a central facility through which important information regarding municipal securities and their issuers is made more readily available to market participants and information vendors. Thus, the Board plans to establish and operate the Official Statement and Advance Refunding Document—Paper Submission system (OS/ARD) of the MUNICIPAL SECURITIES INFORMATION LIBRARY system or MSIL system to provide market participants and information vendors with better access to more information regarding the description of municipal securities and the issuers of these securities. The Board believes that the MSIL system will increase the efficiency and fairness of the municipal securities market and protect investors and the public interest. This increased market efficiency should result in lower costs for issuers in the primary market and fairer prices in the secondary market reflecting all available official information about the issue.

The Board, pursuant to rule G-36, currently collects and stores OSs for most municipal securities issues in paper form. In addition, the Board plans to add other documents in paper form to the MSIL system—ARDS provided by underwriters and CDI voluntarily provided by issuers and their agents. Thus, complete up-to-date information on municipal securities will be available from a central source. The Board's role in the MSIL system will be analogous to the SEC's role in collecting, storing, and providing access to corporate securities documents. However, it is important to emphasize that all CDI will be provided voluntarily to the MSIL system.

Through its public access facility, any interested party may review and copy

OSs at the Board's offices. The OSs are available within one business day of receipt by the Board. Because of the limited accessibility the Board's public access facility provides and because of the inefficiencies of storing paper documents, the Board plans to store these documents (along with ARDs and CDI) electronically. The Board also plans, through the MSIL system, to make these documents available, on paper and tape. The users of the MSIL system will be value-added resellers, municipal securities professionals and individual members of the public. The MSIL system is intended to foster "value added" information products. Vendors will be able to resell the whole documents and/or information from those documents (e.g., extracts, summaries) in any format the vendor chooses (e.g., paper, CD Rom, optical disks). The daily tape can be translated into character-coded form to allow for computerized text searches of documents (as one vendor has proposed to do). Demand for new products will occur as market participants seek to ensure that they have full access to the information found in the MSIL system database and will be shaped by availability of documents in electronic format.

The Board does not intend, through its MSIL system, to be the sole source of information regarding municipal securities or to provide value-added services; rather it seeks to broaden access to existing public information through a variety of channels that are responsive to the needs of market participants. In this regard, the Board welcomes the plans of other groups to develop or serve as collectors and disseminators of municipal securities information. The Board does not believe that its efforts will inhibit the efforts of these groups to increase the availability of municipal securities information. In fact, the Board believes that the MSIL system will assist others in their important information collection and dissemination activities because of the completeness of the information in the MSIL system and its easy accessibility in a useful format.

The Board believes that it is imperative that the MSIL system start providing access to municipal securities information as soon as possible. Within approximately six months of Commission approval, the MSIL system can begin operation.

#### System Objectives and Overview

The MSIL system will be planned and operated under four guiding principles which define its scope and intent.

1. The purpose of the MSIL system is to collect, electronically store, and make

available OSs and ARDs for municipal securities.

2. The MSIL system will be planned and operated in a manner that will provide equal access to documents to any interested person in a non-discriminatory manner, in a manner that will not confer special or unfair economic benefit to any person, and in a cost-effective manner supported by a combination of Board funds and user fees.

3. The Board will encourage and facilitate the development of information dissemination services by private vendors, but the MSIL system will be planned and operated in a manner to preserve its flexibility to meet additional information needs, beyond dissemination of OSs and ARDs, when there is a clear and continuing failure by private sector information sources to provide information that is essential to the integrity and efficiency of the market.

4. The MSIL system will be planned and operated in a manner to ensure as much flexibility as possible in adjusting to changes in technology of document storage and dissemination and to changes in disclosure practices in the market.

The Board's operation of the facility will be subject to several important legal and policy constraints:

1. The Board has no statutory authority to regulate the content or format of disclosure by municipal securities issuers.

2. It will not alter the substance of the documents or summarize the submissions.

3. It will not store or transmit documents in any way that would be likely to introduce errors into the data.

These restrictions require that the MSIL system be capable of accepting paper copies of OSs and ARDs, in any format, and of producing exact paper copies of these documents, upon request. The Board has concluded, after receiving the advice of its technical advisory, the MITRE Corporation, that electronic document storage by use of the digital imaging process is the best method of meeting these requirements while, at the same time, offering the best means for inexpensive long-term storage of and easy access to the documents. This has led the Board to adopt a plan to implement a system which can be expanded and improved to facilitate the purposes of the MSIL system and the guiding principles. In the system, the paper source documents submitted will be converted to digitized electronic images which can be used to print a faithful copy of the original. Two initial

outputs will be produced: single printed copies of OSs and ARDs and a magnetic tape containing all documents imaged in one day.

The central computer index, discussed below, and the imaging technology have been designed to include the possibility of accepting paper copies of CDI, such as annual financial reports, submitted on a voluntary basis. The systems regarding CDI also will be operated according to the Board's guiding principles. As noted previously, the Board will begin developing its plan for accepting voluntary submissions of paper CDI, and pricing related output, soon after the OS/ARD system is operational. This plan will be filed with the Commission for its review and approval.

The Board also intends to move rapidly to implement the capability to accept voluntary submissions of, and to provide access to, electronic submissions of certain CDI. Electronic submissions would be more efficient to accept, store and process than paper documents and would be in a better format for manipulation, transmission and production of derived information products by VARs. Of course, the MSIL system always will accept paper copies of OSs, ARDs and CDI.

#### Computer Index

The MSIL system computer index will be developed to ensure that all documents received by the Board will be tracked efficiently and accessed quickly. In addition, because a number of documents may relate to the same issue (e.g., an OS, ARD and CDI), the computer index also must record relationships between documents. The basic concept is that of an electronic "file folder"—all documents pertaining to an issue will be related through the index. This will facilitate the identification of documents which relate to specific issues.

The computer index will, of necessity, be complex. While it will be based on the CUSIP numbering system, these numbers can change over time. Also, there are numerous relationships between documents (e.g., CDI must be related to a particular issue and that issue's other documents) and documents may relate to one or more than one issue (e.g., refunded and refunding issues). The MSIL system computer index, however, will provide the necessary means for the Board to identify documents in a comprehensive and complete storage and access facility.

#### System Operations

The MSIL system will be composed of subsystems which capture and

disseminate documents, as well as administer the system. In the document capture subsystem, the source documents will be received, indexed, scanned, quality checked and stored. A computer index database will be built using information from the documents themselves, the Board's Form G-36 (provided by underwriters pursuant to rule G-36), and issue identification data from the CUSIP Service Bureau. Within three business days of receipt of each new issue document, the system will have completed its processing and will make the document available in both tape and paper form. The document capture subsystem will accept current OSs and ARDs at the rate they are submitted to the MSIL system. The rate of production of these documents varies from year to year. For purposes of sizing the system, the Board used an annual estimate of 10,000 OSs and 3,000 ARDs. A backlog of OSs and ARDs produced since January 1, 1990, also will be entered. These documents, in addition to historic OSs and ARDs, if made available, will be used to maintain a level daily workload. Based on these factors, the system has been designed to accommodate easily an annual processing rate of one million pages. The priorities for entering documents into the system will be (1) new issue documents; (2) the back-log of documents from January 1, 1990 received pursuant to rule G-36; and (3) certain other OSs and ARDs which have been made available. Thus, the Board expects that new issue documents generally will be processed in the MSIL system and available on the daily tape and by request within three days of receipt and, in most cases, probably earlier. Of course, documents received by the Board will be available at its public access facility within one business day of receipt.

MSIL quality standards are intended to ensure that every document page is imaged and that the printed version is as legible as the original. Exception procedures will apply to problematic pages of documents containing poorly printed text, foldouts, the use of color, and grey or halftone artwork. In general, the imaging technology employed will store any information contained on a page with the same degree of accuracy as a photocopying machine. Additional information about quality standards is included in section 4.8 of the System Concept Paper (included in File No. SR-MSRB-89-9). The procedures to be followed to ensure that these standards are met will be developed by the system contractor in its Quality Assurance Plan. Paper copies of inputted documents will be retained for one year, then discarded.

The dissemination subsystem will produce a tape output with images on a daily basis and the printed document copies on request. The daily tape will contain an index of the documents included. The dissemination subsystem will include capabilities to search the computer index database to support system operators in filling individual requests for documents and to support the Board's needs for system management information. Printed documents produced in response to individual requests received by 2:30 p.m. each business day will be mailed, express mailed or made available at the MSIL system the same day. The daily tape that includes documents made available during the day will be produced by the close of business the same day. The MSIL system customer service operation will be operated from at least 9 a.m. Eastern time to 4:30 p.m. Eastern time, the same hours of operation of the Board's public access facility.

The administrative subsystem will provide customer service, billing, document tracking, and project management capabilities. It will accumulate data about the number of documents processed, their status, and the workload performed by the system.

#### Pricing

In planning the MSIL system, the Board believed that the average annual cost of contracting with a service provider for this facility would be \$.01 or less per \$1,000 par value of the bond based on current bond volume. The MITRE Corporation provided estimates to the Board that ranged between \$700,000 and \$1 million, depending on the volume of documents that were processed.

The Board has received a number of bids in response to its request for proposal. Some bids were above and some below these estimates. Since the Board will be negotiating with the potential service providers, it is not in a position to provide further details. However, based on the bids, the Board believes that these estimates are correct.

The Board plans to use general revenues of the Board for the collecting, indexing, and storing costs of MSIL system documents. The costs of providing paper copies and the daily tape will be paid for by user fees. This is consistent with the Commission's policy to require that SRO fees be based on the expenses it incurs in providing the information, i.e., cost-based. The Board believes that this dissemination cost-based pricing plan is in the public interest because it will ensure that a

complete collection of important municipal securities information will be available, at a fair price, for the life of the municipal securities.

Based on the information currently available to the Board, the Board believes that it will charge approximately \$15.00 for a paper copy of an OS or an ARD. The daily tape will be provided on an annual subscription basis of approximately \$12,000. Postage or delivery fees also will be added to the tape or document price. Based on an average of 25 documents per daily tape, this will result in a per document cost of less than \$2.00 per OS or ARD. The Board will review the MSIL system prices annually to ensure that the MSIL system dissemination costs are paid for from user fees. The Board does not expect to make a profit from the MSIL system.

#### Background

*Proposed amendments to provide written descriptive information to secondary market customers.* In 1985-87, the Board held many discussions on the need for a central source of official, descriptive information on municipal securities. One area on which the Board focused was the increasing complexity of municipal securities issues (e.g., complicated put and call provisions). In many cases, secondary market investors were confused about the nature of call provisions in the securities they had purchased. In August 1988, the Board proposed a draft amendment to rule G-15 which would have required dealers to provide written descriptions of all call features, upon request, to secondary market customers. In May 1987, another draft amendment was published which would have required dealers to provide OSs to secondary market customers, upon request. The Board proposed this amendment because the OS is the only place where one can find a complete, official issuer description of its securities. While financial and other information in OSs becomes stale or misleading over time, the description of the securities (and their credit) remain applicable for the life of the bonds (up to 40 years or more). The comment letters received from dealers revealed their inability to comply with these requirements without a reliable and readily available source of official information on issues, such as that found in OSs. While a microfiche service of OSs existed at this time, apparently commentators did not view this service as a particularly helpful way to access OSs. Based on the comments received, the Board did not adopt the amendments.

*Advance refunding information.* The Board also has attempted to deal with problems in the secondary market caused by the lack of ready access to other official issuer documents. In 1986, the Board monitored a situation involving issues which are "escrowed to maturity." The situation resulted from an attempt which was made to substitute securities deposited for escrow in an "escrowed to maturity" issue and to change the effective maturity of the issue with a second advance refunding. This problem created a substantial negative effect on the market value of all "escrowed to maturity" securities—a problem which was exacerbated when market participants were unable to obtain ready information on the terms in the issuer documents that described the original advance refundings. Although the Board published a notice on the situation and adopted certain confirmation requirements to clarify which securities should be labeled as "escrowed to maturity," it could not change, by rule, the fact that the market did not have ready access to the information that would allow the securities to be properly described.

In response to a letter from the Board on this topic, in 1988, the Commission noted that, before a security is sold as "escrowed to maturity" or "pre-refunded to a call," the dealer "should have conducted a reasonable investigation to satisfy itself that the documents relating to the prior bond issue and the refunding bond issue, including the official statement and escrow trust agreement, support such characterization."

*Board's December 1987 proposal.* After extensive deliberation on these and other problems, the Board concluded that the difficulties could not be addressed effectively by writing additional rules for dealers, but only be better access for all market participants to official information about municipal securities issues. In December 1987, the Board wrote the Commission and suggested that it adopt a rule that would require issuers to provide OSs and ARDs to a central facility or "repository," where the documents would be made available to all parties requesting them.

By requiring mandatory submission of documents, the proposed facility would provide for a comprehensive collection of official documents. This would serve the important purpose of ensuring that this information would be available to the secondary market in later years. In addition, by providing mandatory timing requirements for submission of the documents to the repository, the

Commission could use its authority to facilitate the prompt production and dissemination of OSs for distribution into the primary market. Finally, the collection, storage and dissemination of documents in electronic form would greatly increase the ability of ultimate users of the repository to access the exact information needed quickly and inexpensively. The Board informed the Commission in its letter that it would be willing to serve a leadership role in creating such a facility. The Board also stated that it was committed to exercising its full rulemaking authority to take whatever additional actions were necessary to bring improvements in the area.

The Board's letter to the Commission generated a number of comments among market participants on the idea of a repository. Although the Commission did not adopt the rule sought by the Board, it released proposed Rule 15c2-12 in September 1988 and concurrently asked for comment on the general concept of a repository, as had been advanced by the Board.

Proposed Rule 15c2-12 was aimed, in part, at prompt production of OSs for new issues and the prompt dissemination of those documents in the primary market. In effect, it would require OSs to be produced according to a specific timetable. The proposed rule, however, applied only to issues in excess of \$10 million in par value. The Board commented in support of the rule, but suggested that it should be applied to all issues with a par value of \$1 million or more. The Board also reviewed a number of comments submitted to the Commission by other parties, many of which expressed support for the idea of a central repository of official issuer documents.

*Board's June 1989 letter.* The Board was encouraged by the Commission's actions relative to the production and timing of OSs and by the positive comments the Commission received on the repository concept. The Board wrote the Commission on June 1, 1989, and stated that it would be willing to establish and manage a repository of OSs and ARDs, contingent upon the SEC extending Rule 15c2-12 to apply to issues of \$1 million par value or larger. The Board stated that the repository facility it envisioned would function in a manner similar to a public library, collecting and indexing documents and disseminating documents to any interested party. The Board noted that the facility would be funded by a combination of Board funds and user fees.

*Board's actions to implement information library.* On June 28, 1989, the Commission released the final version of Rule 15c2-12. The Commission made the rule applicable to most issues of \$1 million par value or larger. For those issues, the rule effectively requires that OSs be prepared and be made available no later than seven business days after the date of sale. The effective date for Rule 15c2-12 was set for January 1, 1990. Based on these developments, the Board immediately began the process of planning its facility for the collection and dissemination of OSs and ARDs.

The Board appointed a Repository Committee to oversee the development of the project. The Board also contracted with the MITRE Corporation to provide technical advice on the planning and implementation of the facility. The Board, the Repository Committee, the Board's staff and MITRE representatives have discussed the repository idea with numerous parties, including investors, issuers, rating agencies, dealers, analysts, private information providers, industry and trade groups, and several parties who have expressed interest in becoming involved in the information dissemination process. The input from these parties has been valuable in structuring the MSIL System Concept, discussed below.

*Rule G-36.* On June 1, 1990, the Commission approved rule G-36. The rule requires underwriters to provide OSs to the Board and applies to all issues, with certain exceptions for issues with limited placements, short-term issues and issues with short-term characteristics. The Board will accept OSs not subject to the rule, if voluntarily provided by underwriters. The Board will provide access to the public to these OSs at its offices within one business day of receipt.

The Board has filed with the Commission amendments to rule G-36 to require underwriters to provide ARDs to the Board for inclusion in the public access facility and the MSIL system. The Board believes it is important that documents which describe the terms of advance refundings also be made available to market participants.

#### System Concept for Implementing MSIL

In August 1989, the Board published a set of four principles by which it would be guided in establishing the MSIL system.

The first guiding principle states:

The purpose of the MSIL system is to collect, electronically store, and make available OSs and ARDs for municipal securities issues to improve accessibility of information about municipal securities.

This principle recognizes that improving access to information contained in these documents will have near-term and long-term benefits to the market. In the near term, having a central location with a complete set of OSs and ARDs will assist market participants and information vendors in accessing important information on outstanding issues. Such access will help to ensure that dealers comply with Board fair practice rules in their transactions with customers and price their securities fairly. In addition, investors will have access to this information to assist in the valuation of their portfolios. In its communications with dealers, customers, analysts, information vendors, and other market participants, it has become clear that the need for CDI is at least as great as the need for the descriptive information in OSs and ARDs. Increased access to more complete information on municipal securities and their issuers will result in increased efficiency and fairness and protect investors and the public interest. This increased market efficiency should result in lower costs for issuers in the primary market and fairer prices in the secondary market which reflect all available information about the issue.

In addition, in planning for the future, it has become clear that efficient, long-term access to this information depends on its availability in an electronic, digitized format. Storage of documents in paper form causes problems over the long-term. Reproducing an original paper document requires handling, disassembling and wear and tear that eventually destroys the original. In addition, paper documents would have to be printed so that they would not physically age for the system life of the bonds *i.e.*, over 40 years). This would require the use of non-acid containing paper as well as the use of other techniques to produce archival quality documents. If issuers did not certify that their documents would last the life of the bonds, the Board would have to copy the documents on to archival quality paper.

Paper also does not encourage and facilitate development of information dissemination services by private vendors. Paper would require vendors to perform data entry or scanning of documents in order to obtain the data needed for improved dissemination services. Paper storage also takes a great deal of space. To store a year's supply of OSs and ARDs in a manner that ensures easy access, the Board estimates that a paper filing system necessitates 500 square feet of space. Over 30-40 years, such space requirements would be unworkable.

Finally, paper lacks flexibility to adjust to changes in document storage and dissemination technology and to changes in disclosure practices in the market.

While microfilm or microfiche storage was the only economic storage medium available prior to the development of electronic storage, and, while this technology is useful for archival purposes, there are three weaknesses of this medium. First, like paper, it does not encourage and facilitate development of information dissemination services by private vendors. Microfilm/microfiche is inconvenient to use and inefficient compared to paper. Microfilm/microfiche would require vendors to perform data entry or re-image the film in order to obtain data for dissemination services. In addition, data management, individual page access, and the capability to incorporate modular submissions are difficult with microfilm/microfiche.

The second weakness of this medium is the lack of flexibility to adjust to changes in technology of document storage and dissemination and to changes in disclosure practices in the market.

The third weakness is that a small percentage of pages may have quality problems that prevent generation of a good copy. These problems include small type size, broken or missing characters, and the use of color. Similar problems are found in electronic storage. These problems can be reduced through the contrast control; however, the contrast control affects all the pages on the microfilm/microfiche and is not page specific as it is in electronic storage.

Electronic storage involves storing images or characters on electronic devices controlled by computers. Electronic storage is highly flexible and can greatly improve the accessibility of information. It can also facilitate the development of information dissemination services because of the efficiencies, compared to paper or microfiche, of transmitting and processing information. Finally, it can adjust to changes in technology of document storage and dissemination and to changes in disclosure practices in the market. There are two weaknesses with electronic storage—magnetic tape and fixed magnetic disks degrade with time and a small percentage of pages may have quality problems that prevent a good copy from being made. To ensure the long-term storage of tapes and disks, the data should periodically (*e.g.*, every 10 years) be recopied, which is an easy task. Quality problems can be reduced

through the use of page-specific image enhancement and thresholding techniques. They can also be reduced by attaching a message to the electronic copy stating the MSIL system quality standard was not met, and then storing the original paper page in an easily accessible location.

The Board has determined that electronic storage is the most effective way to store OSs and ARDs received pursuant to rule G-36 as well as other official disclosure documents that may be submitted voluntarily in paper form. The Board believes that efficient electronic storage and access can be accomplished by using digital imaging technology. The digital imaging process converts the image of each page of a paper document into digitized code. The page images are stored in this form on computer media such as optical disks. With the assistance of a computer, the images of the pages then can be retrieved and printed with a very high quality of reproduction, similar to that achieved by top-quality photocopying machines. The process allows for electronic storage of documents, while preserving the graphic characteristics of each page (styles and sizes of type, page structure, etc.). The digital imaging process is now used by many companies and government agencies for efficient storage, access and reproduction of paper documents.

While imaging data requires a larger amount of electronic storage than certain other data formats (e.g., character encoding and optical character recognition), the Board decided on imaging because it preserves exactly the look of the inputted page—be it textual, maps, etc. Since the Board cannot dictate formats for these documents, this feature is imperative. In addition, other formats, like character encoding, cannot easily deal with non-textual data, an important characteristic of OSs. Finally, optical character recognition cannot assure 100 percent accuracy, which the Board demands. Imaging does; thus, it is the best process for the MSIL system.

Those persons interested in purchasing documents in digitized form would be able to purchase documents processed by the MSIL system each day on magnetic tape. These tapes are prepared each day in the document input process. Duplicates of the tapes can be made easily. The daily tape might be chosen by users interested in maintaining their own comprehensive libraries for private use, by users who wish to resell the documents through their own distribution channels, or by users who wish to summarize, abstract

or extract the documents and sell the information in a more compact form. A vendor subscribing to the tape service would be most likely to reorganize or reformat the documents or extract information from the documents to fit the needs of end users. Although several vendors now sell information extracted from paper documents and several sell paper copies of OSs, no vendor currently is providing electronic copies of documents.

Through the Board's public access facility, anyone may review OSs at the Board's offices and make copies at \$.20 a page. In its order approving Board rule G-36, the Commission expressed some concern about the location of the public access facility, noting that its current or future location must be reasonably accessible to the general public, including NRMSIRs. In addition, the Commissioners raised the benefit of having an access facility in New York City, where a number of dealers engaged in municipal securities activities and NRMSIRs are located. It was noted, however, that the importance of the facility's physical location is reduced with an electronic system through which quick access and dissemination could be achieved.

The Board believes that it would not be cost-effective to set up public access facilities around the country. The Board has estimated that the cost of the public access facility at the Board's offices will be approximately \$200,000–\$250,000 per year. Other locations could cost even more. A better and more cost-effective way of dealing with the access to paper copies of OSs and other documents would be to follow the lead of the Commission in its agreement with a vendor to provide information in its public reference room for resale to the public. Thus, as part of its agreement with its MSIL system contractor, the MSIL system will provide individual paper copies of system documents, upon request, along with the daily tape of imaged documents. Requests for individual documents would be processed to allow for overnight mailing of the documents (by regular mail or next-day service). While certain vendors also currently provide this paper copy service, the Board will be charging an amount higher than current NRMSIRs charge. The Board, therefore, does not believe that the MSIL system will usurp the opportunity of the current NRMSIRs to market paper documents, but rather will serve as an assurance to the market that a comprehensive collection always will be available. It also will promote the activities of NRMSIRs by assuring

that the NRMSIRs can obtain paper copies to complete their collection.

The second guiding principle states:

The MSIL system will be planned and operated in a manner that will provide equal access to documents to any interested person in a non-discriminatory manner, in a manner that will not confer special or unfair economic benefit to any person, and in a cost-effective manner supported by a combination of Board funds and user fees.

Through its rulemaking authority and rule G-36 the Board has a special ability to establish and maintain a complete collection of OSs and ARDs. A crucial aspect of the guiding principles is the Board's recognition of the value of an easily accessible, comprehensive collection of information about municipal securities issues and the Board's obligation to ensure that the market receives this information in a scrupulously fair manner. The Board consistently has endeavored in all of its activities to ensure that its actions do not produce special or unfair economic benefit to specific parties. The Board accordingly will ensure that the MSIL system makes the information available to all parties on an equal basis. Information acquired from the Board also may be used, resold, or disseminated by any person without restriction and without payment of additional fees.

Any organization hired by the Board to operate the MSIL system will be subject to detailed oversight by the Board, both to ensure that information is provided to all parties on an equal basis and to ensure that operations proceed in a cost-effective manner. Such organization, which will have the best access to information in the MSIL system, will not be allowed to use this access for its own benefit in the market. To ensure this, the Board's contract with any organization will prohibit it from brokering or dealing in municipal securities or engaging in municipal securities information services not covered by the contract which create the appearance of a conflict of interest with the purposes of the MSIL system. All MSIL system revenues collected by the facilities manager will go directly to the Board to defray operating expenses. The facilities manager will receive its MSIL system income solely from the Board.

The Board's intention to establish and operate the MSIL system is based on both near-term and long-term benefits to the market in the form of readily accessible information. The Board believes that it is important to view the facility not only as a means to ensure that documents for new issues are

available in the primary market in 1990, but also to ensure that, 20 or 30 years later, there exists at least one facility which has a comprehensive collection of the official documents of outstanding issues, and that those documents will be accessible efficiently, under equal terms, by all market participants. The Board accordingly believes that it is necessary to commit Board funds now to ensure that such a collection exists in usable form in the future. The Board does not intend or expect that the MISL system will generate net revenues to the Board.

As noted above, the Board estimates MISL system operational costs of OS and ARDs to be approximately \$1 million per year. Some commentators are concerned about this cost. As noted previously, the Board's current public access facility will cost approximately \$200,000-\$250,000 a year. Additional sites would probably cost more. The Board believes that the MSIL system is a cost-effective approach to document storage and access. Any additional moneys for the MSIL system are more than outweighed by: (1) The benefits to investors of a central, complete electronic source of important municipal securities information; (2) the benefits to information vendors of easily accessible electronic information; and (3) the market efficiency, in both the new issue and secondary market, resulting from improved access to this information.

Since 1976, the Board has required underwriters to pay a fee to the Board based on the par amount of municipal securities underwritten. This fee has ranged from \$.01 to \$.05 during this period. The Board has rarely, if ever, received complaints from issuers or underwriters about the size of the fee. The Board is acutely aware of the need to limit expenditures to those necessary to effectuate Board purposes. In that vein, it did raise the fee from \$.01 to \$.02 in October, 1989. The fee increase was based on the Board's declining fund balance and expected expenses to plan the MSIL system. Had the MSIL system planning costs not been incurred, the fee, nevertheless, would have been raised to \$.02 within the next six months because of the Board's declining fund balance.

Upon the Commission's approval of the MSIL system, the Board believes another \$.01 fee increase (bringing the total fee to \$.03) will be necessary to cover MSIL system expenses. This translates to \$.03 per \$1,000 par value of bonds underwritten. A typical underwriting spread may be from \$10 to \$15 per \$1,000. The underwriter pays the assessment from this spread. The Board believes that this increase will not cause

issuers harm—in fact, the market efficiency brought about by the MSIL system should reduce issuer costs by more than \$.01 per bond. In addition, alternate methods of information collection and dissemination may well cost much more. The Board also does not believe that the increased fee will be a financial burden on dealers. The Board does not foresee additional fee increases based on MSIL system expenses. Any further enhancements should be self-supporting.

The third guiding principle states:

The Board will encourage and facilitate the development of information dissemination services by private vendors, but the MSIL system will be planned and operated in a manner to preserve its flexibility to meet additional information needs, beyond dissemination of OSs and ARDs, when there is a clear and continuing failure by private sector information sources to provide information that is essential to the integrity and efficiency of the market.

The Board recognizes that several private information vendors currently provide a variety of information services to the market, including sales of OSs as well as summary information. Industry participants are particularly interested in services that summarize or abstract official documents regarding municipal securities. The Board will not summarize documents and sell document summaries, as is now done by private sources. The Board, however, notes that OSs, ARDs, and CDI are not proprietary documents, but rather are official, public documents provided by municipal issuers and their agents. As such, the documents are crucial to a market in which securities are sold to the general public. The Board therefore believes that the role of the MSIL system—assuring the continued accessibility of these documents—is an appropriate one, even through private vendors also may offer complete documents for sale.

A primary goal in operating the MSIL system will be to increase dissemination of the documents through making the information available in electronic form, on an equal basis, to all interested parties. By doing this the Board hopes and intends to broaden the channels through which documents are supplied. The MSIL system will seek to assist private information vendors in obtaining and disseminating both complete documents and summary information by assuring that the vendors have access to a complete collection of OSs and ARDs for all issues subject to rule C-36. The Board expects that the planned daily updates to this collection, available in digitized form, will create new efficiencies for the existing information vendors and may make it possible for

other information vendors to enter the market and offer information through their own channels.

The Board also has stated in this guiding principle its intention to respond to market needs for information beyond OSs and ARDs if the information essential to the integrity and efficiency of the market is not being provided by private information providers. In meetings with issuer and industry groups, investors, analysts, bond trustees and others, it has become clear that there is a critical need in the market for timely access to continuing disclosure information on municipal securities issues. It appears that some issuers would be willing to provide copies of continuing disclosure documents, such as annual reports, on a voluntary basis, to a central facility if, and only if, that central facility ensures equal access to the information by all interested persons. In addition, an organization representing bank trustees formally has asked the Board to consider including certain information provided by trustees in the MSIL system. The facility will be designed with the flexibility to accommodate these purposes and the Board intends to pursue these areas as immediate goals.

The fourth guiding principle states:

The MSIL system will be planned and operated in a manner to ensure as much flexibility as possible in adjusting to changes in technology of document storage and dissemination and to changes in disclosure practices in the market.

The MSIL system is an evolving project. The intent is for the facility to be able to accommodate foreseeable changes in information dissemination technology and municipal securities disclosure practices without requiring the initial "imaging" system to be abandoned or redesigned. As an example, the technology chosen will allow amendments to OSs or ARDs to be accommodated in the system. In addition, some issuers have expressed an interest in providing a document to the facility which later could be incorporated by reference in an OS or other document submitted to the facility. The MSIL system will be designed to accommodate "modular submissions," in which separately submitted documents are combined into one document for dissemination. This should allow a quick evolution to accommodate issuers wishing to take these approaches.

Considerable efficiencies in the collection, storage and transmission of information can be obtained if information is provided to a central source in standard, computer-readable

formats similar to those used in common word-processing equipment. This would greatly enhance the ability of ultimate users of information to find and obtain the specific information needed with respect to an issue quickly and efficiently. Some issuers have expressed an interest in voluntarily providing information in computer-readable format for this reason. The MSIL system will be able to accommodate such developments if issuers show an interest and wish to do so on a voluntary basis.

There are several other ways in which the MSIL system might evolve to improve the manner in which information is accessed by the municipal securities market. The Board intends that the MSIL system will have the flexibility to develop various kinds of services in which documents may be made available in formats different from the daily computer tape or paper copies.

The Board believes that the MSIL system will perform an important function in the municipal securities market by making information about municipal securities and its issuers readily available at a fair and reasonable price—resulting in increased market efficiency and investor protection.

The Board has adopted the proposed rule change pursuant to section 15B(b)(2)(C) of the Securities Exchange Act of 1934, as amended, which authorizes the Board to adopt rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in municipal securities and, in general, to protect investors and the public interest. As noted by the Commission in its release approving rule G-36, section 15B(b)(2)(C) is a broad grant of authority to the Board and provides ample authority for the Board's collection of OSs. The Commission also stated that it is essential that professionals and investors have access to complete and timely descriptive information about municipal securities and municipal securities issuers. Thus, to the extent it enhances information dissemination of new issue securities, rule G-36 is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. The MSIL system will assist in effectuating the purposes of rule G-36 by significantly increasing the scope of information concerning municipal securities made available to the general

public and market participants and, thus, also is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. The MSIL system also would allow the Board to consider possible rulemaking initiatives to ensure that customers have complete information regarding municipal securities. The Board's guiding principles, discussed above, are consistent with the Act because they seek to ensure that the operation of the MSIL system will assist all participants in the market, provide for equal access to all its information and not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

As noted above, MSIL system costs will be paid for by a combination of the general revenues of the Board and user fees. The vast majority of the Board's general revenues are provided by underwriter assessment fees, adopted pursuant to section 15B(b)(2)(J), which states that the Board may set reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board. The Board believes that the use of such revenues for MSIL system expenses is reasonable because the MSIL system will assist in effectuating the purposes of rule G-36 and will benefit the municipal securities market with increased market efficiency and investor protection.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Board does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The barriers to entry for municipal securities information vendors traditionally have been high because of the costs involved in locating official documents from hundreds of dealers and thousands of issuers, and receiving, sorting, storing, and processing these paper documents in a timely fashion. These factors help to explain why the municipal securities market has few of the information products that are commonplace in the corporate securities market. The MSIL system is pro-competitive because it will offer potential and existing vendors, for the first time, an inexpensive and comprehensive source for official documents. This will dramatically lower the cost of entering this information market and the cost of providing new and existing products. While existing vendors may not welcome increased competition by other vendors,

documents in the MSIL system are important public documents containing vital information regarding municipal securities and their issuers. The Board's role is not to compete with vendors or to protect existing vendors from competition with other vendors but to act to increase market efficiency and investor protection.

The Board encourages information vendors to disseminate information acquired from the MSIL system. The Board believes that the creation of the MSIL system will not impose any burden on competition among such information vendors or between the Board and such vendors because, as noted by the Board in its guiding principles, the Board will operate the facility in a manner that: (1) Will provide equal access to documents to any person; (2) will not confer special or unfair economic benefit to any person; and (3) will encourage and facilitate the development of information dissemination services by private vendors. By providing information vendors with a comprehensive collection of documents in electronic form at a fair and reasonable price, the MSIL system will encourage the dissemination of OSs and ARDs, as well as the creation of new municipal securities information products. This may well increase the number of vendors providing such products.

Certain commentators have stated that the MSIL system, in effect, could give the Board a monopoly in the sale of certain documents and thus negatively impact those entities involved in the sale of such documents. The Board strongly disagrees with such characterizations. The information available in the MSIL system is public information available from issuers, underwriters, and others. The Board's system will be a central access location for much of this information, and the entire data base will be made available in both paper and electronic form at a fair and reasonable price. Re-dissemination of the documents and the information therein will not only be permitted but encouraged. No "monopoly" of information can exist if it is freely available on this basis. In addition, the MSIL system will not become a "bottleneck" for such information because all documents will be made available within one business day of receipt in the Board's public access facility and within three business days of receipt electronically and by paper, upon request.

As noted above in the section on pricing, the Board currently plans to

charge more the NRMSIRs currently charge for paper copies of OSs. Thus, the Board believes that it will not be competing with vendors in the sale of paper OSs because its "market" for paper OSs will be only those persons who are not able to obtain the document from other entities. Because of the \$12,000 annual subscription rate for the daily tape containing all OSs and ARDs for that year, vendors should be able to keep their own prices low for the sale of documents and other information services. The Board believes that the subscription rate represents an amount less than the amount necessary for a typical vendor to collect the documents and to ensure that all documents are received, even with the existence of the Board's public access facility. In addition, over the long-term, electronic storage of this information, on tape, will be at a lower cost than storage in paper form.

In addition, the Board does not plan to offer and "value-added" services. The daily tape will be a series of "imaged" documents provided in the order in which the documents are received by the Board. Because of this and the computer storage requirements of imaged format, it is unlikely that end users generally will turn to this format in preference to the formats that can be offered by private vendors. This leaves ample room for vendors to market a variety of products to customers. One vendor has announced a product (a CD Rom Service) that it indicates may be derived directly from the daily tape. This service would be in a "character coded" format which is more commonly used by end users of electronic data and which, unlike "imaged" format, allows computerized text searches. As noted previously, no vendor currently supplies OSs in an imaged form so there is no competitive impact on Board activities in this area.

The Board wishes to emphasize that OSs and ARDs are public documents that now are and will continue to be available, upon request, through a number of channels, such as issuers and underwriters. In addition, pursuant to SEC Rule 15c2-12, underwriters wishing to reduce the period of time they must deliver copies of OSs to potential customers can do so only by providing a NRMSIR with a copy of the document. The Board will not seek NRMSIR status to ensure that this benefit to NRMSIRs is not reduced. The Board welcomes and seeks to encourage vendor involvement in disseminating municipal securities information.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others.*

(a) Written Comments.

The Board received 17 comments on the proposed rule change.

1. *General support for or opposition to project.* The vast majority of commentators support the MSIL system. For example, seven commentators note the critical need for improved access to information about municipal securities and believe that the MSIL system can address this need. Two commentators are interested in the Board moving ahead quickly to deal with trustee disclosure problems. Two commentators ask that the Board move quickly in voluntarily obtaining CDI from issuers. One investor commentator states that currently the delivery system for CDI is unsatisfactory and must be remedied quickly. One issuer commentator notes that, given the direction of the system, issuers will be able to participate and the MSIL system will assist frequent issuers in terms of pricing and market growth. The commentator also offers to transmit its latest OS electronically to test such a system. Two commentators state that the Board's MSIL system will enhance the integrity and efficiency of the municipal securities market. Another commentator adds that the MSIL system will assist individual and institutional investors in analyzing and evaluating municipal securities. However, one commentator is concerned that the MSIL system will negatively affect its municipal securities information services and one argues that the Board in moving too fast and using unproven technology to deal with information dissemination problems currently being addressed by NRMSIRs.

2. *Costs.* Three commentators are concerned about the costs of the MSIL system. Cost information has been included in this filing. As noted previously, the Board believes that the MSIL system will increase the efficiency and fairness of the municipal securities market and protect investors and the public interest. This increased market efficiency should result in lower costs for issuers in the primary market and fairer prices in the secondary market reflecting all available official information about the issue. The Board believes that these cost savings more than outweigh the cost of the MSIL system.

While two commentators state that Board prices for MSIL system services should be competitive with NRMSIRs, the Board believes that the price it will charge for paper copies of OSs will be

higher than that currently charged by NRMSIRs. Thus, the Board believes that the MSIL system will service mainly those customers who cannot use the MSIL system tape output or cannot obtain the necessary documents from vendors.

3. *Timely Availability of Information.* Three commentators are concerned that the MSIL system information may not be available quickly enough after receipt by the Board. One commentator states that the documents should be processed within one business day of receipt. Currently, the system plan for OS/ARD is to have documents imaged and indexed within three days of receipt. This parameter was determined by cost considerations. If, for example, 50-75 OSs are received in one day, the extra machinery and personnel required to handle the scanning and indexing of these documents in one day could greatly increase current cost estimates. Allowing three days for this process reduced the necessary personnel and machinery. Of course, during period when fewer OSs are received at the OS/ARD system, the input process probably could be concluded within one or two days. (Once in the system, a request for a document already scanned and indexed would be processed for same-day or next-day mailing.) In addition, OSs would be available in the Board's public access facility within one business day of receipt.

The Board notes that OSs are public documents which should be available to dealers and customers prior to availability from the MSIL system since the system will receive them, pursuant to the requirements of rule C-36, up to two weeks after the date of sale. As one commentator notes, even after the MSIL system is operational, investors still need direct access to issuers and underwriters to obtain securities and issuer information. While the Board views the MSIL system as a central source for such information, since the documents are public, issuers and underwriters should continue to provide information directly to investors whenever possible.

4. *Competitive Concerns.* Two commentators are concerned about the competitive implications of the MSIL system in regard to NRMSIRs. In fact, one suggests that the Board sell bulk information only to NRMSIRs since sales to others will hurt its business. However, another commentator notes that the MSIL system will not compete with its information services but, in fact, will help information vendors do their job better because it will ensure that market participants are on a more equal

footing in regard to information. One commentator notes that there is still room for private vendors to provide additional value-added information to securities. One states that it is a benefit that the Board, a public body, will provide a central source for the information. It adds that this will help to protect the industry should a private vendor exit the business or possibly become the sole vendor. Two commentators note that a current information service limits access to competitors and state that the MSIL system's equal access approach to information would benefit market participants. As discussed above, the MSIL system will provide very basic services and be operated under guiding principles adopted by the Board which call for equal access by all to the MSIL system information. This will provide vendors with the ability to sell whole documents to the market in the formats and in collections for which there is demand. It also will strongly promote other summary and evaluative information services to the municipal securities market.

**5. Technical Issues.** One commentator states that the Board is utilizing a technology that is flexible and adaptable to the rapidly changing communications environment. Another commentator notes that "imaging" will ensure optimum issuer participation while the future goals of electronic transmission and dissemination should assist frequent issuers in terms of pricing and market growth. One commentator states that the technology is too advanced. As noted above, imaging is used extensively as an efficient electronic data storage system.

One commentator suggests that the Board add text search capabilities to the MSIL system. The Board previously decided to use imaging technology and allow value-added resellers to use optical character reading ("OCR") to code the information in a manner suitable for text searching. One vendor has announced a service to OCR OSs. As noted previously, OCR does not guarantee 100 percent accuracy of information—imaging does.

Two commentators ask that the MSIL system information be available on personal computers. Again, this is a value-added service which the Board hopes vendors soon will offer. Two commentators also state that the MSIL system should provide facsimile delivery of documents. Because OSs are, on average, 50-100-page documents, it would not be practical at this time to send such documents by facsimile

machine. Again, vendors could provide this service to customers.

#### (b) Comments at Meetings on System Concept

Three Open Meetings were conducted to explain the System Concept and to solicit comment on it. At each meeting, the background of the project and the System Concept were explained. Members of the audience wishing to make formal comments then were heard, followed by a less formal question and answer session. The meeting on January 31, 1990, in New York was attended by approximately 50 persons. Five persons attended the meeting in Dallas on February 1, 1990, and 10 persons attended the meeting in Los Angeles on February 2, 1990.

**1. General support for or opposition to the project.** Four commentators generally endorsed the Board's efforts to create a central electronic library as a means to improve disclosure in the municipal securities market. Several of these commentators noted that obtaining official documents in a timely manner was difficult and that a central electronic library would help to remedy this deficiency. Two commentators emphasized the need for the Board to include continuing disclosures by issuers in the MSIL system. One commentator expressed qualified support for the Board's efforts.

Two commentators expressed opposition to the MSIL system. They noted that the Board has not announced cost figures, prices and the financing strategy for the project, except to state that the project will be funded with a combination of Board funds and user fees. One suggested that issuers would pay for the project, while the other suggested that dealers would pay. One commentator questioned whether the expense of the electronic library is justified by demand for electronic dissemination. Two commentators were concerned that the Board might operate the MSIL system in a manner which would discourage the development of services by private information vendors.

**2. Technical issues.** Of the commentators who spoke on the technical aspects of the System Concept, most were positive. One commentator noted that the Board's approach generally was consistent with her firm's approach of moving away from paper storage to electronic storage of documents. One commentator expressed the opinion that the technology was too advanced for market needs, while one commentator indicated that it might not be sufficiently advanced. Neither offered suggestions on how or whether the technology should be changed.

One commentator from the audience in Dallas indicated a desire to obtain OSs through a terminal or personal computer. Another stated his needs for a state-by-state collection of OSs in electronic form. One commentator suggested that the Board look into storing OSs for 20 years, rather than six years, after maturity. The Board believes that these services can be provided by private vendor services.

**3. Miscellaneous.** One commentator stated that the Board should waive underwriting assessments for dealers underwriting deals in which the issuer agrees to provide continuing disclosure information.

During the question and answer sessions in New York and Dallas, audience members asked why the Board could not simply require issuers to provide documents in a specific format in order to simplify electronic document storage. Apparently, they did not understand the statutory constraints under which the Board operates. Several persons expressed opinions which indicated confusion over the respective roles of NRMSIRs and the Board's MSIL system.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the *Federal Register* or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5

U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing also will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 9, 1990.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: July 12, 1990.

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 90-16898 Filed 7-18-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. 34-28200; File No. SR-NASD-90-38]

**Self-Regulatory Organizations;  
Proposed Rule Change by National  
Association of Securities Dealers, Inc.  
Relating to Service Charges for the  
National Quotation Data Service**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on July 9, 1990, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's  
Statement of the Terms of Substance of  
the Proposed Rule Change**

The NASD is proposing a service charge for receipt and use of the National Quotation Data Service ("NQDS"). NQDS service incorporates Level 1 and Last Sale information into a combined or "bundled" feed that will be supplied to NQDS vendors.

**II. Self-Regulatory Organization's  
Statement of the Purpose of, and  
Statutory Basis for the Proposed Rule  
Change**

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below,

of the most significant aspects of such statements.

**A. Self-Regulatory Organization's  
Statement of the Purpose of, and  
Statutory Basis for, the Proposed Rule  
Change**

In a filing submitted to the SEC in 1988, SR-NASD-88-35, the NASD set out in detail the derivation of cost-based fees for the NQDS service. The analysis of cost-based fees was based on recovery of operational costs, systems and product/service development costs, overhead and general and administrative costs ("G&A") and residual overhead and G&A costs, and the financial exhibits attached to that filing are hereby incorporated by reference.<sup>1</sup> The proposed fees elicited adverse commentary submitted on behalf of NQDS vendors,<sup>2</sup> and in response, the NASD sought to negotiate a fee that would effectively recover expenses associated with delivery of the service while addressing the concerns of the NQDS vendors. The NASD believes that the fee of \$50.00/month per display will recoup the majority of development and operational expenses and will facilitate receipt of information by subscribers on fair and equitable terms by including delivery of Level 1 and last sale services NQDS subscribers.<sup>3</sup> As a result, NQDS service will be expended to include individual market maker quotations, Level 1 or "inside" quotations in NASDAQ and NASDAQ/National Market System ("NMS") issues, and NASDAQ/NMS last sale information.

NQDS information will be disseminated pursuant to the \$50.00 monthly fee and the NQDS vendors will elect to either remit the charges to the NASD directly or allow the NASD to bill subscribers directly, as is done with other NASD sponsored information delivery services. If the NQDS vendor elects the direct collection process, the

NASD will be precluded from identifying ultimate subscribers of the NQDS, and the NASD will rely upon contractual provisions to assure that NQDS vendors maintain accurate and reliable lists of subscribers and devices that receive NQDS information. NQDS vendors will guarantee payments for subscribers if they do not wish to disclose their customer lists to the NASD, but in any event the NASD will, pursuant to contract, retain the right to audit subscriber lists of NQDS vendors to ascertain that the correct number of information display units are being assessed service charges.

In addition, because of disparities in billing procedures of some foreign direct vendors and retransmission vendors of NQDS information in the past, the NASD will contractually retain the right to audit records of NQDS vendors with regard to transmission of NQDS data in foreign countries.

The NASD will assess monthly fees for each "chargeable unit" which is defined as a device capable of accessing or that has actually accessed NQDS information. Included within the concept of a chargeable unit will be the receipt of NQDS data on multiple screens (with a limit of six physical screens) operating off a single keyboard location at a single trader's workstation.

In addition, although the NASD believes that there is substantial legal basis supporting collection of retroactive fees, in the interest of resolving the lengthy proceedings over NQDS service charges, the NASD proposes to begin charging the \$50.00 monthly fee beginning on the first of the month following Commission approval of the instant filing, and will waive all retroactive fees due the NASD since the initiation of NQDS service in 1983.

Finally, the NASD believes that the fee of \$50.00 per month for NQDS service is fully consistent with the Commission's directives on this matter as articulated in its order of April, 1984.<sup>4</sup> The derivation of the NQDS fee conforms to the directives enunciated in the Commission's April order in that the fee allows the NASD to recover those costs associated with operating a "pass-through" system that collects, validates and prepares quotations for shipment to the vendor. The amended fee proposal maintains the cost-based nature of NQDS fees while responding to vendors' concerns by including Level 1 and last sale services within NQDS.

The statutory basis for the proposed rule change is found in section 15A(b)(5)

<sup>1</sup> SR-NASD-85-35, Release No. 34-26119 dated September 27, 1988, 53 FR 39002, October 4, 1988, is being withdrawn in favor of the instant filing.

<sup>2</sup> Letter from Daniel T. Brooks, Counsel to Instinet Corporation, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated October 25, 1988, and letter from Stephen L. Williams, Executive Vice President, Bridge Information Systems, Inc. to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated October 31, 1988. See also, response letter from Frank J. Wilson, Executive Vice President and General Counsel, NASD, to Jonathan G. Katz, Secretary, Securities and Exchange Commission dated March 8, 1989.

<sup>3</sup> The NQDS service will permit vendors to receive, package and disseminate the existing data feeds of Level 1 and last sale information with the individual market maker quotations available through the NQDS feed—the three data streams will not be consolidated by the NASD.

<sup>4</sup> See Securities Exchange Act Release No. 20874 (April 17, 1984), 49 FR 17640.

of the Securities Exchange Act of 1934. Section 15A(b)(5) requires that the rules of the Association "provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the association operates or controls." The service charges for the NQDS service have been revised in response to concerns articulated by vendors of the service.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The NASD does not foresee any burden on competition by the proposed rule change not necessary or appropriate in furtherance of purposes of the Act. The NQDS subscriber charge is intended to eliminate the uncertainty and confusion prompted by the temporary charge that has been in place pending resolution of the dispute surrounding NQDS cost allocations. Thus, Commission approval of the instant subscriber charge should facilitate longer term planning by NQDS subscribers in determining how many display devices should receive the NQDS. Simultaneously, implementation of the revised NQDS fee will permit vendors to market the NQDS in reliance upon a permanent cost-based charge versus a temporary one. In sum, establishment of a permanent NQDS charge advances the notion of competitive fairness from the perspectives of vendors as well as the NASD.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

Comments were neither solicited nor received, however the instant filing is the result of protracted negotiations with vendors of NQDS information.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

- A. By order approve such proposed rule change; or
- B. Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and

arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by August 9, 1990.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: July 12, 1990.

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 90-16900 Filed 7-18-90; 8:45 am]  
BILLING CODE 8010-01-M

[Rel. No. IC-17582; 811-5290]

**Alliance Strategic Multi-Market Trust, Inc.; Application**

July 12, 1990.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of Application for Deregistration under the Investment Company Act of 1940 (the "1940 Act").

**APPLICANT:** Alliance Strategic Multi-Market Trust, Inc. ("Applicant").

**RELEVANT 1940 ACT SECTIONS:** Section 8(f).

**SUMMARY OF APPLICATION:** Applicant seeks an order declaring that it has ceased to be an investment company under the 1940 Act.

**FILING DATES:** The application on Form N-8F was filed on May 7, 1990.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing.

Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 6, 1990, and should be accompanied by proof of service on Applicant, in the form of an affidavit or,

for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 1345 Avenue of the Americas, New York, New York 10105.

**FOR FURTHER INFORMATION CONTACT:** Robert A. Robertson, Staff Attorney, at (202) 504-2283, or Stephanie M. Monaco, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch or by contacting the SEC's commercial copier at (800) 231-3282 (in Maryland (301) 258-4300).

**Applicant's Representations**

1. Applicant represents that it is an open-end non-diversified management investment company incorporated under the laws of the State of Maryland. On January 2, 1990, Applicant filed a Notification of Registration under section 8(a) of the 1940 Act. On that same date, Applicant file a registration statement under section 8(b) of the 1940 Act and the Securities Act of 1933. However, the SEC never declared the registration statement effective, and Applicant never made a public offering of its securities.

2. Applicant has not transferred any of its assets to a separate trust within the last 18 months. In addition, it has not retained any assets for any purpose.

3. Applicant has no shareholders and is not aware of any liabilities that remain outstanding. It also has no knowledge of any litigation or administrative proceeding to which it is a party. Lastly, Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 90-16899 Filed 7-18-90; 8:45 am]

BILLING CODE 8010-01-M

[File No. 500-1]

**Order of Suspension of Trading; Litas International, Inc.**

July 18, 1990.

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of Litas International Inc., and that questions have been raised about the lack of registration of its securities under section 5 of the Securities Act of 1933, and information concerning, among other things, whether the securities are freely, the financial condition of Litas International, Inc. and the business prospects of Litas International, Inc.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to section 12(k) of the Securities and Exchange Act of 1934, that trading in the above-listed company, over-the-counter or otherwise, is suspended for the period from 9:30 a.m. EDT, July 16, 1990 through 11:59 p.m. e.d.t. on July 25, 1990.

By the Commission.

Jonathan G. Katz,  
Secretary.

[FR Doc. 90-16897 Filed 7-18-90; 8:45 am]

BILLING CODE 8010-01-M

**SMALL BUSINESS ADMINISTRATION****[Declaration of Disaster Loan Area # 2430; Amdt. # 2]****Iowa; Declaration of Disaster Loan Area**

The above-numbered Declaration is hereby amended in accordance with amendments dated July 2, 5, and 6, 1990, to the President's major disaster declaration of May 26, to include the Counties of Calhoun, Clarke, Hamilton, Keokuk, Mahaska, Marion, Monona, Monroe, and Wapello as a disaster area as a result of damages caused by severe storms and flooding between May 18 and July 6, 1990.

In addition, applications for economic injury loans from small businesses located in the contiguous Counties of Appanoose, Buena Vista, Davis, Decatur, Ringgold, Van Buren, and Wayne in the State of Iowa may be filed until the specified date at the above location.

Any counties contiguous to the above-named primary counties and not listed herein have previously been named as

contiguous or primary counties for the same occurrence.

All other information remains the same, i.e., the termination date for filing applications for physical damage is July 25, 1990, and for economic injury until the close of business on February 26, 1991.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: July 11, 1990.

Alfred E. Judd,

Acting Assistant Administrator for Disaster Assistance.

[FR Doc. 90-16825 Filed 7-18-90; 8:45 am]

BILLING CODE 8025-01-M

**[Declaration of Disaster Loan Area # 2432]****Ohio; Declaration of Disaster Loan Area**

As a result of the President's major disaster declaration on June 6, 1990, and amendments thereto on June 8, 10, 15, 16, and 18, 1990, I find that the Counties of Athens, Belmont, Butler, Clermont, Fairfield, Franklin, Hamilton, Harrison, Hocking, Jackson, Jefferson, Lawrence, Licking, Monroe, Muskingum, Perry, Pike, Ross and Vinton constitute a disaster area as a result of damages caused by severe storms, flooding, and tornadoes beginning on May 28, 1990. Applications for loans for physical damage may be filed until the close of business on August 6, 1990, and for loans for economic injury until the close of business on March 6, 1991, at the address listed below:

Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Fl., Atlanta, Georgia 30308, or other locally announced locations. In addition, applications for economic injury loans from small business located in the contiguous counties of Adams, Brown, Carroll, Clinton, Columbiana, Coshocton, Delaware, Fayette, Gallia, Guernsey, Highland, Knox, Madison, Meigs, Montgomery, Morgan, Noble, Pickaway, Preble, Scioto, Tuscarawas, Union, Warren, and Washington, in the State of Ohio; Boyd, Bracken, Campbell, Greenup, and Kenton, in State of Kentucky; and Brooke, Cabell, Hancock, Marshall, Mason, Ohio, Tyler, Wayne, Wetzel, and Wood Counties in the State of West Virginia may be filed until the specified date at the above location.

Any counties contiguous to the above-named primary counties and not listed herein have previously been named as contiguous or primary counties for the same occurrence.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere .....	8.000
Homeowners Without Credit Available Elsewhere .....	4.000
Businesses With Credit Available Elsewhere .....	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere .....	4.000
Others (Including Non-Profit Organizations) With Credit Available Elsewhere .....	9.250
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere .....	4.000

The number assigned to this disaster for physical damage for the State of Ohio is 243206.

For economic injury the numbers are 708100 for the State of Ohio; 708000 for the State of Kentucky; and 708200 for the State of West Virginia.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: June 19, 1990.

Alfred E. Judd,

Acting Assistant Administrator for Disaster Assistance.

[FR Doc. 90-16826 Filed 7-18-90; 8:45 am]

BILLING CODE 8025-01-M

**[Declaration of Disaster Loan Area #2424]****Oklahoma; Declaration of Disaster Loan Area**

As a result of the President's major disaster declaration on May 18, 1990, and an amendment on May 22, I find that the Counties of Atoka, Bryan, Carter, Johnston, Lincoln, Love, Marshall, McIntosh, Murray, Payne, Pittsburg, Pottawatomie, Roger Mills, and Sequoyah, are a disaster area as a result of damages caused by severe storms, flooding, and tornadoes beginning on April 14, 1990. Applications for loans for physical damage may be filed until the close of business on July 17, 1990, and for loans for economic injury until the close of business on February 19, 1991, at the address listed below:

Disaster Area 3 Office, Small Business Administration, 4400 Amon Carter Blvd., Suite 102, Ft. Worth, TX 76155, or other locally announced locations. In addition, applications for economic injury loans from small business located in the contiguous counties of Adair, Beckham, Cherokee, Choctaw, Cleveland, Coal, Creek, Custer, Dewey, Ellis, Garvin, Haskell, Hughes, Jefferson,

Latimer, LeFlore, Logan, McClain, Muskogee, Noble, Okfuskee, Pawnee, Pontotoc, Pushmataha, Seminole, and Stephens in the State of Oklahoma, and Hemphill, Lamar, and Wheeler Counties in the State of Texas may be filed until the specified date at the above location.

Any counties contiguous to the above-named primary counties and not listed herein have previously been named as contiguous or primary counties for the same occurrence.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere.....	8.000
Homeowners Without Credit Available Elsewhere.....	4.000
Businesses With Credit Available Elsewhere.....	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere.....	4.000
Others (Including Non-Profit Organizations) With Credit Available Elsewhere.....	9.250
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere....	4.000

The number assigned to this disaster for physical damage for the State of Oklahoma is 242406, and for economic injury the number is 706400. The economic injury number for the State of Texas is 706300.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: June 1, 1990.

Bernard Kulik,

Deputy Associate Administrator for Disaster Assistance.

[FR. Doc. 90-16827 Filed 7-18-90; 8:45 am]

BILLING CODE 8025-01-M

[Delegation of Authority No. 1-A; Revision 17]

#### Delegation of Authority; General Counsel, et al.

Delegation of Authority No. 1-A (Revision 16) is hereby revised to read as follows:

(a) Pursuant to authority vested in me by the Small Business Act, of 1958, 72 Stat. 384, as amended, authority is hereby delegated to the following officials in the following order:

- (1) General Counsel
- (2) Associate Deputy Administrator for Management and Administration
- (3) Associate Deputy Administrator for Special Programs

- (4) Associate Deputy Administrator for Finance, Investment, and Procurement
- (5) Chief of Staff

to perform, in event of the absence of incapacity of the Administrator and the Deputy Administrator any and all acts which the Administrator is authorized to perform, including but not limited to authority to issue, modify, or revoke delegations of authority and regulations, except exercising authority under sections 9(d) and 11 of the Small Business Act, as amended.

(b) An individual acting in any of the positions in paragraph (a) remains in the line of succession only if he or she has been designated acting by the Administrator or Acting Administrator due to a vacancy in the position.

(c) This delegation is not in derogation of any authority residing in the above-listed officials relating to the operations of their respective programs, nor does it affect the validity of any delegations currently in force and effect and not revoked or revised herein.

**EFFECTIVE DATE:** July 19, 1990.

Dated: July 12, 1990.

Susan Engeleiter,  
Administrator.

[FR Doc. 90-16828 Filed 7-18-90; 8:45 am]

BILLING CODE 8025-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Environmental Impact Statement: Edgecombe and Martin Counties, North Carolina

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Rescind notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that the Environmental Impact Statements will not be prepared for a proposed highway project in Edgecombe and Martin Counties, North Carolina.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert L. Lee, District Engineer, Federal Highway Administration, P.O. Box 26806, Raleigh, North Carolina 27611, Telephone (919) 790-2856.

**SUPPLEMENTARY INFORMATION:** A Notice of Intent to prepare the Environmental Impact Statements (EIS) for the proposed highway projects to improve US-64 in Edgecombe and Martin Counties, North Carolina, was issued on July 28, 1988 and published in the August 11, 1988 *Federal Register*. The FHWA, in cooperation with the North Carolina Department of Transportation, has since determined that the proposed

highway project will not be Federally funded and hereby rescinds the previous Notice of Intent.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Robert L. Lee,

District Engineer, Raleigh, North Carolina.

[FR Doc. 90-16871 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-22-M

## DEPARTMENT OF THE TREASURY

### Public Information Collection Requirements Submitted to OMB for Review

Date: July 13, 1990.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

#### Financial Management Service

OMB Number: 1510-0013

Form Number: TFS 2208

Type of Review: Extension

Title: States Where Licensed for Surety

Description: Information is collected to report, in Treasury Circular 570, Surety Licenses of Treasury certified companies.

Respondents: Businesses or other for-profit, Small businesses or organizations

Estimated Number of Respondents: 300

Estimated Burden Hours Per Response: 1 hour

Frequency of Response: Annually

Estimated Total Reporting Burden: 300 hours

Clearance Officer: Jacqueline R. Perry (301) 436-6453, Financial Management Service, Room B-101, 3700 East West Highway, Hyattsville, MD 20782.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive

Office Building, Washington, DC  
20503.

Irving W. Wilson, Jr.,  
Departmental Reports, Management Officer.  
[FR Doc. 90-16811 Filed 7-18-90; 8:45 am]  
BILLING CODE 4810-35-M

#### Office of Thrift Supervision

##### Appointment of Conservator; Capital-Union Federal Savings Association

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for Capital-Union Federal Savings Association, Baton Rouge, Louisiana, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16795 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Conservator; North Texas Federal Savings Association

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for North Texas Federal Savings Association, Wichita Falls, Texas on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16797 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Conservator; Progressive Savings Bank, F.S.B.

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly

appointed the Resolution Trust Corporation as sole Conservator for Progressive Savings Bank, F.S.B., Natchitoches, Louisiana, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16798 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Conservator; Summit First Savings and Loan Association, F.A.

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for Summit First Savings and Loan Association, F.A., Summit, Illinois, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16799 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Receiver; Capital-Union Savings, F.A.

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(A) of the Home Owner's Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Capital-Union Savings, F.A., Baton Rouge, Louisiana, Docket No. 0759, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16792 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Receiver; North Texas Federal Savings and Loan Association

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(A) of the Home Owner's Loan

Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for North Texas Federal Savings and Loan Association, Wichita Falls, Texas, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16793 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Receiver; Progressive Federal Savings Bank

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(A) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Progressive Federal Savings Bank, Natchitoches, Louisiana, OTS Docket No. 3154, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16794 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

##### Appointment of Receiver; Summit First Federal Savings and Loan Association

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(A) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Summit First Federal Savings and Loan Association, Summit, Illinois, Docket No. 2779, on July 13, 1990.

Dated: July 13, 1990.

By the Office of Thrift Supervision.

Debra J. Ahearn,  
Program Analyst.

[FR Doc. 90-16795 Filed 7-18-90; 8:45 am]  
BILLING CODE 6720-01-M

# Sunshine Act Meetings

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

## FEDERAL ELECTION COMMISSION

**DATE AND TIME:** Tuesday, July 24, 1990, 10:00 a.m.

**PLACE:** 999 E Street, NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

### ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.  
Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and title 26, U.S.C.  
Matters concerning participation in civil actions or proceedings or arbitration.  
Internal personnel rules and procedures or matters affecting a particular employee.

**DATE AND TIME:** Thursday, July 26, 1990, 10:00 a.m.

**PLACE:** 999 E Street, NW., Washington, DC. (Ninth Floor).

**STATUS:** This meeting will be open to the public.

### MATTERS TO BE CONSIDERED:

Correction and Approval of Minutes  
Draft Advisory Opinion 1990-10: Ms. Carolyn F. Bigda on behalf of the Texas Air Corp. PAC

Status of Presidential Audits  
Administrative Matters

### PERSONS TO CONTACT FOR INFORMATION:

Mr. Fred Eiland, Press Officer,  
Telephone: (202) 376-3155.

Marjorie W. Emmons,  
Secretary of the Commission.

[FR Doc. 90-17017 Filed 7-17-90; 1:58 pm]

BILLING CODE 6715-01-M

## FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS:

**TIME AND DATE:** 10:00 a.m., Wednesday, July 25, 1990.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

**STATUS:** Closed.

### MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

### CONTACT PERSON FOR MORE

**INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated July 17, 1990.

Jennifer J. Johnsons,  
Associate Secretary of the Board.

[FR Doc. 90-17065 Filed 7-17-90; 3:34 pm]

BILLING CODE 6210-01-M

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

**TIME AND DATE:** 10 a.m. July 30, 1990.

**PLACE:** 5th Floor, Conference Room, 805 Fifteenth Street, NW., Washington, DC

**STATUS:** Open.

### MATTERS TO BE CONSIDERED:

Interfund transfer schedule.

### CONTACT PERSON FOR MORE

**INFORMATION:** Tom Trabucco, Director, Office of External Affairs, (202) 523-5660.

Dated: July 16, 1990.

Francis X. Cavanaugh,  
Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 90-16972 Filed 7-16-90; 4:51 pm]

BILLING CODE 6760-01-M

## SECURITIES AND EXCHANGE COMMISSION Agency Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of July 23, 1990.

Open meetings will be held on Monday, July 23, 1990, at 2:00 p.m. and 4:00 p.m. and Wednesday, July 25, 1990, at 9:30 a.m., in Room 1C30. Closed meetings will be held on Monday, July 23, 1990, following the 4:00 p.m. open meeting and on Thursday, July 26, 1990, at 2:30 p.m.

The Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meetings. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17

CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at closed meetings.

Commissioner Fleischman, as duty officer, voted to consider the items listed for the closed meetings in closed session.

The subject matter of the open meeting scheduled for Monday, July 23, 1990, at 2:00 p.m., will be:

The Commission will hear oral argument in connection with its review of an administrative law judge's initial decision with respect to Arthur James Huff. For further information, please contact Herbert Efron at (202) 272-7400.

The subject matter of the open meeting scheduled for Monday, July 23, 1990, at 4:00 p.m., will be:

The Commission will hear oral argument on an appeal by Thomas J. Fittin, Jr., a registered broker-dealer, from an administrative law judge's initial decision. For further information, please contact R. Moshe Simon at (202) 272-7400.

The subject matter of the closed meeting scheduled for Monday, July 23, 1990, following the 4:00 p.m., closed meeting, will be:

Post oral argument discussions.

The subject matter of the open meeting scheduled for Wednesday, July 25, 1990, at 9:30 a.m., will be:

1. Consideration of an application by Capital Market Fund, Inc. (the "Fund"), The SuperTrust Trust for Capital Market Fund, Inc. shares (the "SuperTrust"), and SuperShare Services Corporation for an order of the Commission under section 6(c) of the Investment Company Act of 1940 that would grant exemptions from Sections 4(2) and 22(d) and from Rule 22c-1, and for an order of (i) permit the SuperTrust, a unit investment trust, to issue redeemable units that are divisible at the discretion of unit holders into non-redeemable shares with different investment characteristics; (ii) permit shares of the Fund, an open-end investment management company, to be exchanged for SuperTrust units; and (iii) permit secondary market transactions in SuperTrust units at negotiated prices. For further information, please contact Barry A. Mendelson at (202) 504-2284.

2. Consideration of whether to issue an interpretive letter to the Department of Labor concerning whether the safe harbor of Section 28(e) of the Securities Exchange Act of 1934 encompasses transactions in securities executed by a broker-dealer on a principal (including riskless principal) basis, or transactions in financial futures. For

further information, please contact Henry E. Flowers at (202) 272-2848.

The subject matter of the closed meeting scheduled for Thursday, July 26, 1990, at 2:30 p.m., will be:

- Institution of injunctive actions.
- Settlement of injunctive actions.
- Institution of administrative proceedings of an enforcement nature.
- Settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Daniel Hirsch at (202) 272-2100.

Dated: July 13, 1990.

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 90-17067 Filed 7-17-90; 3:57 pm]

BILLING CODE 5010-01-M

# Corrections

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF EDUCATION

### Office of Educational Research and Improvement-Library Programs

#### Invitation To Apply for New Awards for Fiscal Year 1991; Library Programs

##### Correction

In notice document 90-16362 beginning on page 28868 in the issue of Friday, July 13, 1990, on the part cover and on page 28868 the subject heading should have read as set forth above.

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 333

[Docket No. 80N-476D]

RIN 0905-AA06

#### Topical Antifungal Drug Products for Over-the-Counter Human Use; Diaper Rash Drug Products

##### Correction

In proposed rule document 90-13650 beginning on page 25240, in the issue of Wednesday, June 20, 1990, make the following corrections:

1. On page 25240, the date at the top of the page and throughout this document should read "June 20, 1990".

2. On the same page, in the second column, under **SUPPLEMENTARY INFORMATION**, in the third and fourth lines, the regulatory citation should read "[21 CFR 330.10 (a)(6)]".

3. On page 25244, in the third column, in the final paragraph, in the fifth and sixth line, "August 20, 1990." should read "August 20, 1991."

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 90N-0211]

#### Drug Export; Cyanocobalamin Injection, USP

##### Correction

In notice document 90-14603 appearing on page 25887, in the issue of Monday, June 25, 1990, the heading should read as set forth above.

BILLING CODE 1505-01-D

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Part 563

[No. 90-1266]

RIN 1550-AA27

#### Loans to One Borrower Limitations

##### Correction

In rule document 90-15737 beginning on page 28144 in the issue of Tuesday, July 10, 1990, make the following correction:

#### § 563.93 [Corrected]

On page 28162, in the second column, in § 563.93(a), in the third line, "operation" should read "operating".

BILLING CODE 1505-01-D

The Board of Directors of the American Medical Association has approved the proposed changes in the structure of the organization. The Board has also approved the proposed changes in the structure of the organization. The Board has also approved the proposed changes in the structure of the organization.

### DEPARTMENT OF EDUCATION

Office of the Secretary of Education  
Washington, D. C.

The Department of Education has announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Education has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

For more information, contact the Department of Education.

### DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary of Health and Human Services  
Washington, D. C.

The Department of Health and Human Services has announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Health and Human Services has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Health and Human Services has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Health and Human Services has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Health and Human Services has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

For more information, contact the Department of Health and Human Services.

### DEPARTMENT OF JUSTICE

Office of the Secretary of Justice  
Washington, D. C.

The Department of Justice has announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Justice has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Justice has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Justice has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

The Department of Justice has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

For more information, contact the Department of Justice.

The Department of Justice has also announced that it will be conducting a study of the effects of the new curriculum on the students of the various schools. The study will be conducted by a committee of experts in the field of education.

For more information, contact the Department of Justice.

# **Federal Register**

---

**Thursday  
July 19, 1990**

---

## **Part II**

### **Department of Health and Human Services**

---

#### **Food and Drug Administration**

---

##### **21 CFR Part 101**

**Food Labeling; Definitions of the Terms  
Cholesterol Free, Low Cholesterol, and  
Reduced Cholesterol; Tentative Final Rule**

# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

### 21 CFR Part 101

[Docket No. 84N-0153]

RIN 0905-AB68

### Food Labeling; Definitions of the Terms Cholesterol Free, Low Cholesterol, and Reduced Cholesterol

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Tentative final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a tentative final rule that sets forth amendments to its food labeling regulations that define, and provide for the proper use of, the terms "cholesterol free," "low cholesterol," and "reduced cholesterol" in the labeling of foods and that provide for the use of other truthful and nonmisleading statements about cholesterol content on food labeling. This tentative final rule will permit meaningful declarations about the cholesterol content of foods while preventing misleading claims about this food component. The agency is soliciting comments on the levels of fat and saturated fatty acids in food that, if exceeded, would make the use of the terms "cholesterol free" or "low cholesterol" in food labeling misleading. This tentative final rule also sets forth amendments to the agency's regulations regarding the label declaration of the cholesterol and fatty acid content of foods and sets forth related agency policies.

**DATES:** Written comments by August 20, 1990. The agency is proposing that any final rule that may be issued based on this tentative final rule become effective 1 year following its publication.

**ADDRESSES:** Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Virginia L. Wilkening, Center for Food Safety and Applied Nutrition (HFF-204), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-245-1561.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of November 25, 1986 (51 FR 42584), FDA published a proposal to encourage cholesterol and fatty acid labeling on foods by amending the food labeling regulations to define, and to provide for the proper use of, the terms "cholesterol free," "low cholesterol,"

and "reduced cholesterol" in the labeling of foods. The agency also proposed to permit truthful and nonmisleading declarations about the cholesterol content of foods and to amend current regulations regarding label declaration of the cholesterol and fatty acid content of foods. In addition, FDA set forth related agency policies. Interested persons were given until March 27, 1987, to comment on the proposal.

In the Federal Register of August 8, 1989 (54 FR 32810), FDA published an advance notice of proposed rulemaking (ANPR) that announced a major initiative of the Department of Health and Human Services (DHHS) to take a new look at food labeling as a tool for promoting sound nutrition for the Nation's consumers. FDA asked for public comment on five areas of food labeling, including the use of descriptors such as "cholesterol free" to characterize foods. In furtherance of this DHHS initiative, FDA announced on September 20, 1989 (54 FR 38806), a series of four public hearings to discuss nutrition labeling and other issues related to food labeling, such as the use of descriptors. Although the agency is in the early stages of the general food labeling initiative, it believes publication of this tentative final rule is appropriate at this time. Comments received as a result of the ANPR and persons testifying at the hearings strongly supported the concept of descriptors, particularly cholesterol descriptors. There was near universal agreement that the descriptors should be uniformly defined, and that the Federal government needed to proceed as quickly as possible to develop regulatory definitions for those that currently lack definition.

In response to the 1986 proposal on cholesterol descriptors, FDA received over 1,000 letters, each containing one or more comments, from consumers, health care professionals, universities, State and local governments, foreign governments, trade organizations, consumer advocacy organizations, research institutes, industry, and professional organizations. The comments generally supported the proposal. A number of comments suggested modifications in, or were opposed to, various provisions of the proposal.

The comments on one issue have led the agency to conclude that a final rule is not yet appropriate in this proceeding, and that it should issue this document as a tentative final rule. FDA proposed to allow the use of the terms "cholesterol free" and "low cholesterol" without regard to the fat or saturated fatty acid

content of the food. As explained below (see section I.B. of this document), the comments have convinced the agency that such a position would allow misleading claims in food labeling. Therefore, FDA has revised this tentative final rule in response to these comments to permit "cholesterol free" and "low cholesterol" claims in labeling only when the food contains 5 grams (g) or less fat per serving and 20 percent or less fat on dry weight basis and contains 2 g or less saturated fatty acids per serving and 6 percent or less saturated fatty acids on a dry weight basis. While FDA believes that this change was foreshadowed by the proposal, and thus that no further rulemaking is required, the agency has decided to allow 30 days for comment on the specific levels of fat and saturated fatty acids that the agency has tentatively adopted as prerequisites for use of the "cholesterol free" and "low cholesterol" descriptors. FDA is allowing only 30 days for comment on these levels because of the narrowness of this issue, and because this issue is a logical outgrowth of the proposal.

Although this document is called a "tentative final rule," the agency advises that it considers the document to contain the final determination of the agency on all substantive issues other than on the levels of fat and saturated fatty acids that are consistent with the use of certain cholesterol descriptors.<sup>1</sup> As discussed below, the agency has fully considered all the comments on the proposal in reaching the determinations set forth in this document.

Should the agency receive comments other than on the fat and saturated fatty acid levels or whether the use of claims (i.e., "reduced cholesterol" or comparative claims) should be determined by these levels (or the effective date of the final rule in this proceeding), it will consider the comments, but FDA advises that a

<sup>1</sup> FDA is also proposing to make these regulations effective 1 year after the publication of a final rule. This represents a change from the 1986 proposal, in which FDA proposed to make these regulations effective on the uniform effective date that followed publication of the final rule. However, the agency has reconsidered this issue and tentatively concluded that because of the importance of the provisions of the tentative final rule and because of the great consumer interest in these matters, it would become effective 1 year after publication.

The agency recognizes that this proposed action will shorten the amount of time that manufacturers have to exhaust label inventories. However, the reduction in time will not be great, and the agency tentatively concludes that any costs that may result will be outweighed by the benefits from the increased availability of truthful and nonmisleading information about the cholesterol and fatty acid content of foods.

comment would have to be very significant to cause the agency to make any changes in the rule other than with respect to the fat and saturated fatty acid levels (and to the effective date). The agency also advises that it intends to review any comments that it receives and to issue a final rule as expeditiously as possible.

Several comments raised questions regarding the labeling of fat content. These comments will be addressed in a separate proposal pertaining to fat and fatty acid labeling. This proposal is currently being developed by the agency.

A summary of the suggested changes and of the opposing comments and the agency's responses follow.

## I. General Comments

### A. Mandatory Versus Voluntary Cholesterol Labeling

1. Several comments, concerned that manufacturers would not voluntarily disclose cholesterol content information suggested that this disclosure be mandatory. A few comments stated that without this labeling information, dietary recommendations issued by the government and by medical associations are meaningless and ineffective because the average consumer has no other readily available source of information about cholesterol content.

The agency has reviewed these comments and has concluded that, at this time, given the content of the proposal and FDA's desire to issue a final rule as quickly as possible, establishing a voluntary program for the declaration of cholesterol and fatty acid content is the appropriate step. However, the agency has also tentatively concluded that mandatory nutrition labeling is necessary. In a companion document in this issue of the *Federal Register*, the agency proposes to require nutrition labeling and to require that cholesterol content be included in that labeling.

In addition to proposing mandatory nutrition labeling, FDA is revising its current restrictive regulations which have prevented many manufacturers from adding cholesterol information to their labels. These regulations (21 CFR 101.25(h)) have prohibited most label statements about cholesterol, fat, or fatty acids. They have also required that when cholesterol or fatty acid information is given, the label declare that the information on fat (or cholesterol) that is provided is for individuals who are modifying their dietary intake on the advice of a physician (21 CFR 101.25(d)). The agency believes that once these restrictions

have been removed, and the new regulations are in place, many more manufacturers will voluntarily provide cholesterol information on a wide assortment of products.

Elsewhere in this issue of the *Federal Register*, FDA is requesting comment on serving size as the basis for nutrition labeling and descriptor labeling. This tentative final rule on cholesterol and fatty acids may be subject to modification based on any final action taken on serving sizes.

The agency notes that information on the cholesterol content of foods is rapidly becoming more available to the average consumer through publications issued by the National Cholesterol Education Program (NCEP) as well as by others. NCEP, coordinated by the National Heart, Lung, and Blood Institute (NHLBI) of the National Institutes of Health, is charged with developing programs for the public and for health professionals and their patients to increase awareness of the importance of lowering elevated blood cholesterol levels and to publish necessary information on how to use dietary changes to accomplish this effect. The Coordinating Committee for NCEP consists of over 20 member organizations representing major medical associations, voluntary health organizations, and community programs. Federal agencies, including FDA, have appointed liaison representatives to the program.

2. Several comments were opposed to mandatory nutrition labeling when cholesterol claims are made. These comments asserted that such a requirement would discourage manufacturers from providing any cholesterol information because of space limitations, cost, and seasonal differences in food composition. Comments argued that FDA permitted sodium labeling without triggering full nutrition labeling, and that a similar policy should be adopted for cholesterol labeling.

The agency does not agree that it is appropriate to change its current requirement (21 CFR 101.25(b)(1)) that nutrition labeling be placed on food labels that bear a statement of the cholesterol content of the food. In the etiology of coronary heart disease, dietary cholesterol, total fat, and saturated fatty acids are intrinsically interrelated (Refs. 1 through 3). Consequently, cholesterol information alone on the label of a food product that is low in cholesterol but that contains significant amounts of total fat or saturated fat would be misleading because it would not reveal material facts (21 U.S.C. 321(n)). The comments

provided no data to support the contrary view.

The agency recognizes that its requirement for nutrition labeling to accompany any cholesterol claim may discourage some manufacturers from providing cholesterol information on their label. However, the agency believes that cholesterol claims on food labels will not promote the public health if these claims are misleading through the failure to reveal material facts. Therefore, the agency has not modified its requirement for mandatory nutrition labeling on food labels containing cholesterol claims.

The circumstances for sodium labeling were very different from those that apply here. Most importantly, FDA's determination with respect to sodium labeling was based on the fact that the relationship between sodium consumption and hypertension is generally considered to be relatively independent of other components of the diet. In addition, sodium labeling without mandatory nutrition labeling was an established practice by regulation at the time the agency launched its sodium labeling initiative. In its rulemaking on sodium labeling, the agency found no basis to modify this exception to the requirement of full nutrition labeling (proposal: June 18, 1982 (47 FR 26580); final rule: April 18, 1984 (49 FR 15510)). However, as stated above, the agency is reconsidering its position, and elsewhere in this issue of the *Federal Register* FDA is proposing to no longer permit sodium content labeling without full nutrition labeling.

### B. Relationship of Cholesterol to Fatty Acid Content

3. Over 150 comments were concerned that placing emphasis on cholesterol could mislead consumers into believing that a food free of, or low in, cholesterol would be effective in lowering serum cholesterol levels no matter how much saturated fat or total fat it contained. Many comments, concerned about the emphasis being placed on cholesterol labeling, suggested various methods for insuring that cholesterol claims do not mislead consumers. Some comments suggested prohibiting the use of cholesterol claims when a product contains more than a predetermined level of fat or saturated fat. Several alternative threshold levels were suggested by comments. The suggested levels were based on percent of calories, percent of fat coming from saturates, amount of saturates per serving, amount of saturates relative to polyunsaturates, and prominence of fat on the ingredient list. Other comments suggested requiring

on the principal display panel either: (1) A qualifying declaratory statement adjacent to the claim, such as "Cholesterol Free—See nutrition label on side panel for fat content"; (2) a warning statement about the fat content; or (3) a declaration of saturated fat or total fat content.

The agency recognizes the relationship among dietary cholesterol, saturated fatty acid, and total fat (Refs. 1 through 3). FDA also acknowledges the comments' concern that a food that is high in fat and saturated fatty acid could be labeled as "low cholesterol" or "cholesterol free" under the proposed regulation. The agency has been persuaded by these comments that a clarification of the circumstances in which cholesterol claims are permissible is needed.

Consumers are interested in cholesterol content information because they believe that eating foods with no or low cholesterol will have a significant effect on their blood cholesterol levels and on their chances of developing heart disease (Ref. 4). Moreover, recent surveys have shown that a significant number of consumers are likely to perceive that any food that is labeled as "cholesterol free" or "low cholesterol" will contain no or low levels of fat or saturated fatty acids (Ref. 4). For example, a recent FDA survey has shown that 40 percent of respondents thought that a food labeled "cholesterol free" would also be low in saturated fatty acids, and another 20 percent were not sure what "cholesterol free" implies about saturated fatty acid content (Ref. 4). Survey data also show that 51 percent of respondents thought that cholesterol is found in all foods containing fat or oil (Ref. 4). This finding suggests that consumers would interpret a claim that a food is low or contains no cholesterol as meaning that it also contains no or low fat.

FDA has, therefore, concluded that a significant number of consumers are likely to perceive that any food that is labeled as being "cholesterol free" or "low cholesterol" will have no or low fat and saturated fatty acids. In point of fact, foods containing little or no cholesterol can contain fat and saturated fatty acids at levels that can, as part of a diet, contribute to high blood cholesterol and obesity, both of which are associated with the development of heart disease. Accordingly, FDA has determined that to assure that the terms "cholesterol free" and "low cholesterol" do not mislead consumers, it is necessary to condition their use on the basis that in addition to containing the appropriate amount of cholesterol, the

foods must also contain levels of fat and saturated fatty acids that are below specified threshold levels.

FDA's decision to limit the use of the above terms based on the fat and saturated fatty acid content of the food is a reasonable outgrowth of the November 1986 proposal. In that proposal, the agency recognized that "a low or cholesterol-free claim on foods that are high in saturated fat \* \* \* can be misleading \* \* \*" (51 FR 42584 at 42590). In the proposal, the agency stressed that it was "concerned that cholesterol labeling claims not be used in a misleading manner" (51 FR 42584 at 42589). FDA requested comments and "any suggestions as to other definitions that might more effectively inform consumers about a food's cholesterol content" (51 FR 42584 at 42587). The agency's decision in this tentative final rule, therefore, reflects the concerns stated in the proposal and responds to the resulting comments.

The issue now facing the agency is the determination of the specific values for fat and saturated fatty acid content that define the threshold above which "cholesterol free" and "low cholesterol" cannot be used. As stated above, several alternative threshold levels were suggested in comments. These levels were based on percent calories from fat, percent of fat from saturated fatty acids, amounts of saturated fatty acids per serving, amount of saturated fat relative to polyunsaturated fatty acids and the prominence of fat on the ingredient list. The agency has studied these possibilities and has concluded that the threshold levels should be based on the amount of both total fat and saturated fatty acids present in a food. This conclusion is consistent with the recommendations of the recent reports that link intakes of fat, saturated fatty acids, and dietary cholesterol to blood cholesterol (Refs. 1 through 3).

Most recent dietary recommendations advise that to, among other things, reduce blood cholesterol levels, fat intake should be reduced to no more than 30 percent calories from fat for the total diet. A population-adjusted mean of the recommended energy allowances for persons 4 or more years of age, as indicated in the 10th edition of "Recommended Dietary Allowances" (Ref. 5), is calculated to be 2,350 calories (see the proposal published elsewhere in this issue of the Federal Register, entitled "Food Labeling: Reference Daily Intakes and Daily Reference Values"). Since each gram of fat contains 9 calories, 78g of fat (rounded to 75g in that document) would furnish 30 percent of the 2,350 calories. Surveys have

shown that a typical adult consumes approximately 16 servings of food per day (Refs. 6 and 7, p. 168). A total diet could easily be constructed that provides approximately 30 percent calories from fat by incorporating foods containing 5g of fat or less per serving ( $5g \times 16 \text{ servings} = 80g \text{ total fat}$ ).

Similarly, a food that is 16 percent fat on a dry weight basis supplies 30 percent of its calories from fat. Rounding the 16 percent figure up to 20 percent fat, a diet could be constructed around foods containing 20 percent or less fat on a dry weight basis and easily meet the dietary recommendations. FDA has tentatively concluded that the threshold should be defined by dual criteria (5g and 20 percent) because without the percent dry weight criterion, foods with substantial levels of total fat but with small serving sizes could fall under the threshold level for using the cholesterol terms. However, if such foods were consumed frequently, the result would be a significant intake of fat.

FDA has compared the above threshold values with fat content listings for foods (Ref. 8) and has determined that foods generally identified as having substantial levels of fat do not meet these criteria.

Virtually all recent dietary guidelines recommend that, to decrease the risk of atherosclerotic cardiovascular disease, Americans should reduce their average intake of saturated fatty acids (e.g., Refs. 1 through 3). The goal most often cited is the consumption of less than 10 percent of calories from saturated fatty acids. FDA has therefore tentatively concluded that the threshold criteria should also deal with the saturated fatty acid content of the food. Using arguments identical to those used for the fat criterion, the agency has arrived at its tentative determination to set the threshold values of 2 g of saturated fatty acids per serving and 6 percent saturated fatty acids on a dry weight basis.

Therefore, the agency is proposing to provide in § 101.25(a)(2) (i) and (ii) that the terms "cholesterol free" and "low cholesterol" may be used on the labels of foods that contain cholesterol levels that meet the content requirements in those regulations and (1) less than 5 g of total fat per serving and less than 20 percent total fat on a dry weight basis and (2) less than 2 g of saturated fatty acids per serving and less than 6 percent saturated fatty acids on a dry weight basis. FDA is soliciting comments on the threshold values that it has selected. As discussed earlier in this tentative final rule, FDA is providing 30 days for submission of comments.

The agency is not persuaded that a warning statement or a quantitative declaration of saturated fat or total fat content on the principal display panel would assist consumers. Requiring a warning statement would most likely discourage manufacturers from utilizing cholesterol claims because it would put a negative connotation on a positive consumer education statement. Such a result would defeat the intent of this tentative final rule, which is to encourage cholesterol and fatty acid labeling on foods.

Likewise, FDA believes that a quantitative statement regarding the amount of saturated fat or total fat on the principal display panel would fragment quantitative nutrition information. With the exception of sodium, FDA has traditionally limited the declaration of quantitative amounts of nutrients to the nutrition label. It is particularly important that information on the quantities of total fat, categories of fatty acids, and cholesterol be evaluated as a unit rather than as fragmented pieces of information because of the relationship among these food components (see item 2 above). The agency believes that the nutrition labeling format simplifies this task.

4. A few comments expressed the view that a concerted, multifaceted public health education effort was needed to inform consumers on how to use the cholesterol label information.

The agency agrees. Accordingly, FDA is developing a cholesterol and fat initiative that has three objectives: (1) To provide more cholesterol and fat information on food labels; (2) to encourage a reduction in the cholesterol and fat content of processed foods; and (3) to increase consumer understanding of the relationship between cholesterol and fat, especially saturated fat, and health. The program's goal is ultimately to reduce the amount of cholesterol and fat consumed by the population.

FDA plans to meet these objectives by following four courses of action. First, to make food labels more informative, FDA is proceeding with this tentative final rule to ensure that the terms used to describe cholesterol content are used consistently throughout the marketplace. The agency is also developing a similar proposed rule to establish descriptive terms for use in fat and fatty acid labeling. Second, FDA will encourage industry, where feasible, to develop products that are lower in cholesterol and fat and to declare voluntarily cholesterol and fatty acid content on product labels (pending final action on the revisions to nutrition labeling proposed elsewhere in this issue of the Federal Register). FDA will monitor the

marketplace to track the extent of cholesterol labeling and of the introduction of fat and cholesterol-modified foods. Third, the agency will continue to conduct consumer surveys to measure consumer use and understanding of the labeling information. Fourth, FDA, as a member of NCEP, will collaborate closely with NHLBI in consumer education efforts. FDA will continue to publish articles and press releases and to disseminate consumer-oriented materials through its national network of consumer affairs officers and the Consumer Information Center in Pueblo, CO. Also, FDA will cooperate with industry groups to develop materials that will explain each of the descriptors and will urge consumers to use all of the fat and cholesterol information available on the nutrition label.

5. A few comments expressed concern that deleting the declaratory statement "information on fat (and/or cholesterol, where appropriate) content is provided for individuals who, on the advice of a physician, are modifying their dietary intake of fat (and/or cholesterol, where appropriate)" would: (1) imply that the general population, not just high risk individuals, should modify the fat/cholesterol content of their diets; (2) be perceived as condoning self-diagnosis and treatment; and (3) be inconsistent with labeling of cholesterol-lowering drugs, which are required to include a disclaimer directed toward the physician.

The agency does not agree with these comments. Many health professional groups have concluded that a reduction in total fat, saturated fat, and cholesterol is appropriate for the U.S. population as a whole (with the exception of children under 2 years of age) (Refs. 1 through 3 and 9 through 14). Deletion of this statement does not condone self-diagnosis and treatment because diagnosis or treatment of a disease state is no longer considered a precondition for reduction of dietary fat, saturated fat, and cholesterol. In addition, there is no reason for the labeling of low cholesterol foods (which are appropriate for consumption by the general public) to be consistent with the labeling of cholesterol-lowering drugs (which are appropriate for use only by those individuals under direction of a physician for treatment of a disease condition).

#### C. Increments

6. A few comments objected to the use of 5 milligram (mg) increments for the declaration of cholesterol content on the label and suggested that the exact

amount of cholesterol should be declared.

The agency does not agree. Given the natural variability of cholesterol content of food and the analytical variability in the laboratory, declaring the exact amount of cholesterol content for each container would place an unwarranted economic burden on industry and therefore consumers. It would also place an extreme regulatory burden on the limited resources of the agency without providing any significant public health benefit. Increments of 5 mg provide sufficient information to assist individuals who want to moderate their cholesterol intake. The agency has therefore not made the requested change.

The agency points out that proposed § 101.25(a)(2) and (b)(2) on the declaration of cholesterol and fatty acids in nutrition labeling have been editorially revised and redesignated as § 101.9(c)(6)(ii) (a) and (b). This revision moves the discussion of increments into § 101.9, where similar information is located for all other nutrients that are included in the nutrition label. This editorial change also moves the listing of fatty acid categories allowed in nutrition labeling into § 101.9 where it more appropriately belongs.

#### II. Descriptors

7. Several comments objected to the use of descriptors of cholesterol content based on the belief that descriptors will not be understood by consumers unless they are defined on the label. Other comments expressed the view that quantitative information in nutrition labeling eliminates the need for descriptors. These comments generally favored a simple statement of fact giving the amount of cholesterol present or the percent of recommended levels.

FDA does not agree with these comments. The descriptors are designed to attract consumer attention to the product's cholesterol content. The information in nutrition labeling is adequate to inform consumers of the amount of cholesterol in the product and to define the descriptors. Consumers are thus able to associate the descriptors with specific quantities of cholesterol.

The agency does not agree that quantitative information in nutrition labeling eliminates the need for descriptors. FDA is proceeding with this rulemaking, in part, because many respondents to FDA's consumer surveys have reported difficulty in understanding the quantitative information presented in nutrition labeling (Ref. 15). Furthermore, FDA surveys have shown that consumers

want descriptors and find them useful in making food selections. Supermarket studies by FDA have shown that shoppers are using such descriptive terms to make food purchase selections (Refs. 16 and 17). FDA believes that the definitions established in this final rule respond to consumers' needs. The descriptors are simple terms that will help to ensure that consumers are provided uniform and nonmisleading point-of-purchase information about the cholesterol content of the food.

8. A few comments requested additional definitions (e.g., "moderately low cholesterol" at 20 to 50 mg per serving and "very low" at 15 or 20 mg, with an increase in the defined level of "low"). These comments argued that additional definitions would provide greater flexibility in food choices for those wishing to moderate cholesterol intake and would be analogous to the sodium descriptors. Conversely, other comments suggested that consumer confusion could be minimized if only two definitions were used.

While FDA is eager to minimize consumer confusion, it finds that all three descriptors covered by this rule are necessary. Because both "cholesterol free" and "low cholesterol" are currently being used, FDA is defining them to promote consistency in their usage and to help reduce possible consumer confusion. The agency is providing for "reduced" claims to help consumers identify foods that may be useful replacements for traditional foods that contain more cholesterol than the consumer wishes, as well as to encourage manufacturers to develop new products that have substantially reduced cholesterol levels.

9. Several comments requested that FDA permit the use of equivalent terms in lieu of the specified descriptors. The only equivalent term suggested by these comments was "no cholesterol" in lieu of "cholesterol free."

The agency is not providing for the use of unspecified equivalent terms by regulation because it wants to strongly encourage manufacturers to use only those descriptors defined in this regulation. In this way, consumers are presented with a consistent, understandable system of descriptors. However, the agency has no objection to the use of "no cholesterol" as an equivalent term for "cholesterol free." The two terms are sufficiently clear so that there is no reasonable doubt as to their meaning. Accordingly, FDA is amending 21 CFR 101.25(a)(2)(i) to allow for the use of either term.

10. One comment suggested that the definitions should be based on the mg of cholesterol per calorie rather than per

serving, stating that it is the relationship between cholesterol intake and required caloric intake that is important in selecting the appropriate level of cholesterol intake.

FDA disagrees based, in part, on the most recent (1988) position statement of the Nutrition Committee of the American Heart Association (AHA). In 1986, AHA published a position statement recommending that cholesterol intake be based on caloric intake because at that time, AHA felt that the effect of dietary cholesterol on plasma cholesterol was a function of the level of cholesterol consumed per 1,000 calories (Ref. 18). However, further investigation led AHA to change its conclusion and to issue a new statement recommending an absolute limit, i.e., 300 mg per day, on cholesterol intake irrespective of caloric consumption (Ref. 19).

FDA has also taken into consideration consumer experience and understanding in determining the most effective basis for nutrient declaration. In 1981, FDA conducted a survey of consumers, nutritionists, and food industry representatives concerning what nutrition information they thought should be included in food labels to make those labels most useful to consumers in improving nutritional status and reducing dietary health problems. All groups of respondents preferred having nutrition information continue to be presented on a per serving basis rather than per 100 calories or per 100 g (Ref. 20). Accordingly, the agency has not revised the definitions.

11. A few comments asked that FDA establish a "high" cholesterol descriptor to identify foods that furnish large amounts of cholesterol.

The agency is denying this request for two reasons. First, the use of the descriptors established and defined by this final rule is voluntary. FDA considers it highly unlikely that manufacturers will use descriptors like "high cholesterol" even if FDA provides definitions. Second, there is no general scientific agreement on what high cholesterol is in terms of a serving of food. The lack of such a scientific agreement would make such a definition arbitrary. It is the amount of cholesterol consumed in the total diet that is important.

12. One comment suggested that all descriptors (i.e., those for calories, sodium, and cholesterol) be standardized by linking them to a standard such as the U.S. Recommended Daily Allowance (U.S. RDA) (§ 101.9(c)(2)(iv)) or other recommended levels. As an example, the comment

suggested that "free" (as in "cholesterol free" or "sodium free") be defined as a nutritionally insignificant amount, that "very low" be defined as 5 percent or less of current recommendations, and that "low" be defined as 10 percent or less of current recommendations. Following this procedure, "very low cholesterol" would be defined as 15 mg or less cholesterol per serving (or 5 percent of 300 mg), and "low cholesterol" would be defined as 30 mg per serving.

FDA has attempted to maintain as much consistency as possible among the descriptors that characterize the level of various nutrients or other food components. However, nutrients and other food components vary widely according to many parameters, such as their mode of action, the magnitude of differences between recommended levels, distribution in the food supply, and the safety margin for excessive intake. These inherent differences make it inappropriate to use the same percentage cutoffs for all nutrients.

Accordingly, the agency has concluded that this suggestion is not a feasible alternative.

#### A. Cholesterol Free

13. Several comments suggested that the level used in defining "cholesterol free" be zero because "cholesterol free" could only mean the total absence of cholesterol. Other comments suggested that higher levels (e.g., up to 5 mg) should be used in defining "cholesterol free" so as to include skim milk, at 4 mg cholesterol per cup, and similar foods.

The agency does not find these arguments persuasive. To avoid creating misconceptions about the term "free," FDA purposely selected a value, less than 2 mg of cholesterol per serving, that is dietarily insignificant yet that can be detected with analytical certainty.

Moreover, a review of the effects of consuming foods that contain up to 5 mg cholesterol per serving has not persuaded the agency to alter the definition. A person who consumes foods labeled as "cholesterol free" would expect that they, either individually or collectively, would not contribute significantly to the cholesterol levels in his or her diet. Yet, the consumption each day of 10 to 15 "cholesterol free" foods that contain up to 5 mg of cholesterol per serving could furnish up to 75 mg of dietary cholesterol. This is a significant amount of cholesterol. It is 25 percent of the maximum intake of cholesterol recommended for the general public and 35 percent of the maximum

recommended for those on strict cholesterol-restricted diets. (NCEP's Step-two Diet recommends less than 200 mg of cholesterol per day (Ref. 21).) Thus, it would be misleading to call foods contributing up to 5 mg of cholesterol "cholesterol free."

14. One comment objected to the use of "zero" in the nutrition label to represent cholesterol contents of less than 2 mg. The comment urged that FDA require use of the phrase "less than 2 mg." The comment expressed doubt that consumers would be confused by a label that stated "cholesterol free" on the front and "less than 2 mg" on the back.

FDA disagrees. Consumer surveys and consumer correspondence received after promulgating the sodium labeling regulation (49 FR 15510) indicated that consumers were confused when the front panel of the products stated "sodium free" and the back panel declared "5 mg sodium per serving." Therefore, the agency has concluded that, regardless of the minimum amount of cholesterol permitted per serving under the definition "cholesterol free," any quantitative declaration other than zero could cause consumer confusion. Additionally, a quantitative declaration other than zero would not necessarily be more correct because methodological limitations do not permit precise quantification of cholesterol content within the 95 percent confidence level below 2 mg amounts. Accordingly, the agency has not made the requested change.

15. One comment suggested that the definition of "cholesterol free" be revised to apply to "foods containing 2 mg of cholesterol or less per serving using conventional rounding techniques" (emphasis added) to allow for anomalies in analytical results sometimes encountered at very low levels of cholesterol.

The agency does not believe it is necessary to include these "rounding techniques" in the definition. The compliance criteria set out in § 101.9(e)(5) (formerly § 101.25(e)(4)) allow for a 20-percent excess of the declared value for the cholesterol content before a product would be deemed to be misbranded. Therefore, a composite sample of a product making a "cholesterol free" claim would be in compliance if it did not exceed 2.39 mg of cholesterol per serving and its cholesterol content could be declared as "zero" in the nutrition label. Thus, this compliance criterion offers sufficient flexibility to negate the need to incorporate rounding allowances in the definition. Accordingly, the agency has not revised the definition as requested by the comment.

16. One comment suggested that "cholesterol free" be defined in terms of the cholesterol content per serving and per 100 grams (g) of the food. The comment argued that the descriptor could be misleading when used on cholesterol-dense foods with small serving sizes, yet it gave no suggested cutoff level or rationale for an allowable amount per 100 g.

The agency is not persuaded that defining "cholesterol free" solely on the basis of cholesterol content per serving creates a problem for consumers. FDA conducted its own review of foods that come within the proposed "less than 2 mg cholesterol per serving" limitation (FDA determined serving size) and found no food with more than 15 mg of cholesterol per 100 g of food (0.15 mg per g) (Ref. 8). Foods approaching 15 mg per 100 g include dehydrated broths or broth-based soups and dehydrated au jus gravy. These foods have relatively small serving sizes, are infrequently consumed, and are sufficiently low in cholesterol and total fat to be of little dietary significance. Accordingly, the agency has not revised the definition.

17. Several comments recommended changing the definition of "cholesterol free" from "less than 2 mg per serving" to "2 mg or less per serving" in order to be consistent with FDA labeling regulations for the sodium and low calorie descriptors.

The agency advises that the definition for "cholesterol free" is consistent with its sodium counterpart "sodium free" (defined as less than 5 mg) and therefore no change to this definition is necessary. This definition is also not inconsistent with the calorie claim regulations because there is no definition for "calorie free." FDA has traditionally defined the term "free" as "less than," while "low" descriptors have been defined as up to and including the integer specified. Accordingly, the agency has not revised this definition.

18. One comment suggested that no "fat product" (e.g., oil or shortening) should be allowed to make a "cholesterol free" claim.

FDA agrees that a label declaration of "cholesterol free" on a product with significant levels of fat or saturated fatty acids would be misleading. As explained in response to comment 3 above, a significant number of consumers would interpret this term as not only describing its cholesterol content but also its fat and fatty acid content (Ref. 4). This interpretation is not correct. In point of fact, a food that contains no cholesterol may contain significant levels of fat and saturated fat. Therefore, to assure that a "cholesterol free" claim is not

misleading, as explained in response to comment 3 above, FDA is restricting the use of this term to only those products whose fat content and saturated fatty acid content are below threshold levels. The agency is tentatively setting the threshold level for fat at greater than 5 g fat per serving and more than 20 percent fat on a dry weight basis and for saturated fatty acids at greater than 2 g per serving and more than 6 percent saturated fatty acid on a dry weight basis. FDA is requesting comments on these threshold levels. Based on these tentative levels, it is unlikely that a "fat product" would be able to make a "cholesterol free" claim.

#### B. Low Cholesterol

19. A number of comments urged that the definition for "low cholesterol" be expanded to include a second criterion for cholesterol density, based on the amount of cholesterol per g or per 100 calories. Suggested levels ranged from "less than 0.2 mg cholesterol per gram" to "not more than 0.6 mg of cholesterol per gram." Some suggested a level of no more than 10 mg cholesterol per 100 calories. The comments pointed out that providing the second criterion would be analogous to the position that the agency took in developing the definition for "low calorie" foods (43 FR 43248; September 22, 1978). The comments expressed the opinion that the single criterion proposed (less than 20 mg per serving) could result in misleading and potentially harmful labeling practices. They were concerned that some widely recognized "high cholesterol" foods that have small serving sizes, such as butter, lard, and some processed cheese foods, would be permitted to be labeled as "low cholesterol." The comments stressed that despite their small serving sizes, such foods actually may be consumed frequently and in large amounts, resulting in a substantial total daily intake of cholesterol. In addition, the comments were concerned that a "low cholesterol" claim on such foods could encourage consumers to consume the food in larger amounts and more frequently, significantly adding to the total cholesterol intake in an individual's diet.

FDA agrees with the comments that an additional criterion based on cholesterol density is needed. In the proposal, FDA specifically requested comments on the adequacy of the proposed definitions of the descriptors (51 FR 42584 at 42587). The agency pointed out that it was important that label statements not convey a misleading impression about the cholesterol content of a food (51 FR

42584 at 42587). The comments have convinced the agency that use of the "low cholesterol" descriptor could be misleading unless the definition of this term in § 101.25(a)(2)(ii) includes a criterion based on cholesterol density. This additional criterion is necessary because the use of only the criterion proposed (less than 20 mg per serving) could result in widely recognized "high cholesterol" foods with small serving sizes being labeled as "low cholesterol." Such labeling is misleading. The use of the additional criterion will prevent such misleading labeling.

FDA has set the cholesterol density level at 0.2 mg or less cholesterol per g of food after reviewing the levels proposed in the comments and the levels contained in various foods (Ref. 8). The agency has determined that a 0.2 mg cutoff prevents "low cholesterol" claims on most, if not all, foods that may contribute substantial amounts of cholesterol to a person's usual diet.

The criterion based on total calories was not selected because: (1) It would have allowed low cholesterol claims on several processed foods containing primary ingredients that contribute substantial amounts of cholesterol to the diet; and (2) it was based on the 1986 AHA guidelines (Ref. 18), which have been devised (Ref. 19) (see item 10 above), that recommended that cholesterol intake be based on caloric intake. Accordingly, the agency is revising § 101.25(a)(2)(ii) to include a second evaluation criterion based on cholesterol density at 0.2 mg or less cholesterol per g of food product.

20. Several comments suggested that higher levels ranging from 30 to 75 mg cholesterol per serving should be used for defining "low cholesterol." The comments argued that 20 mg per serving would: (1) Limit the number of foods bearing cholesterol information; (2) be directed too narrowly at therapeutic diets; (3) cause consumers to believe that they should avoid many healthy, nutritious foods; and (4) be inconsistent with 21 CFR 101.9(c)(7)(v) which permits a claim that a food is a significant source of a nutrient when that nutrient is present at levels equal to or in excess of 10 percent of the U.S. RDA. Several comments urged a 30-mg cutoff because that amount is 10 percent of the maximum cholesterol level recommended by many health organizations of 300 mg per day. Other comments urged that a lower level be used for defining "low cholesterol," e.g., 2 mg or 5 mg per serving, to prohibit the descriptor from being used for foods not generally considered to be low in cholesterol.

The agency has carefully studied the suggested levels. FDA is not persuaded by the arguments or by its own review of the cholesterol content of foods (Ref. 8) that increasing the quantitative definition of "low cholesterol" is necessary or prudent if the term is to be useful to consumers attempting to control their cholesterol intake.

The 20-mg level does not limit the number of foods that can bear cholesterol information. Declaration of cholesterol content information is voluntary on the part of manufacturers, and foods need not fall within the definitions for the descriptors for manufacturers to include quantitative cholesterol content information in the nutrition label. In fact, FDA encourages all food processors to include such information on product labels whenever possible.

FDA does not agree that the 20 mg per serving level is directed too narrowly at therapeutic diets. Recommendations to limit dietary intake of cholesterol to 300 mg per day are not limited to therapeutic diets. Many health organizations have recommended this level as a prudent diet for all adults (Refs. 2, 3, 9 through 12, and 19). As discussed in the preamble to the proposed rule, the 20-mg level is helpful for highlighting foods that can be used in a mixed diet containing a daily allotment of animal protein by persons striving to moderate their intake of cholesterol.

FDA does not believe that consumers will avoid nutritious foods that do not meet the criteria for the "low cholesterol" descriptor. The consumer education programs discussed previously will be directed at teaching consumers how to use low cholesterol foods to balance the consumption of foods containing higher amounts of cholesterol.

FDA also does not find merit in the suggestion that "low cholesterol" should be defined as 30 mg or less per serving because that amount is 10 percent of 300 mg. The 10 percent significance rule was developed for essential nutrients for which there are U.S. RDA's. FDA is not aware of any basis, and none was provided by the comments, for applying the same level of nutritional significance to the development of definitions for labeling terms for nutrients or for dietary constituents for which overconsumption is the potential problem. Most adults consume 16 servings of food per day. If the 10 percent significance rule were used to define "low cholesterol," a person who consumed a diet that was composed entirely of "low cholesterol" foods could exceed by 60 percent the 300-mg limit

recommended for all healthy adults. Such a situation is not acceptable.

Additionally, the suggested lower levels are not necessary given the agency's decision to include the second criterion in the definition of "low cholesterol" (see item 19 above). This additional criterion will prevent application of the "low cholesterol" descriptor to foods not generally considered to be low in cholesterol. Accordingly, FDA remains convinced that the 20 mg per serving level, in conjunction with the second criterion of 0.2 mg or less per g, is appropriate to highlight foods that may be useful in moderating cholesterol intake.

21. Several comments recommended changing the definition from "less than 20 mg per serving" to "20 mg or less per serving" to be consistent with FDA's labeling regulations for the sodium and low calorie descriptors.

The agency agrees with these comments. Accordingly, FDA is revising § 101.25(a)(2)(ii) to reflect this change.

22. One comment requested that the 20 mg cutoff for the "low cholesterol" descriptor be revised to include "as expressed to the nearest 5 mg increment" as part of the low cholesterol descriptor so that all products with an analytical content between 2.5 and 22.4 mg cholesterol would qualify as "low cholesterol" products.

The agency finds that it is not necessary to add the requested phrase to the definition because the use of a descriptor ("low cholesterol") must be consistent with the cholesterol value declared in nutrition labeling. Thus, products for which the cholesterol content is declared in nutrition labeling in the range of "less than 5 mg" to "20 mg" may be labeled "low cholesterol" (if the food product also contains 0.2 mg or less cholesterol per g). Based on the rule regarding increment reporting in new § 101.9(c)(6)(ii)(b), this range would include foods in which the cholesterol analysis yielded values from 2.0 to 22.4 mg per serving. Accordingly, the agency has not revised the definition.

### C. Reduced Cholesterol

23. A few comments stated that it was confusing and redundant to provide for "reduced cholesterol" claims at a level of 75 percent reduction and also to allow for comparative claims when reductions of less than 75 percent are made. These comments suggested combining these claims into a single category. Other comments expressed concern that consumers could be misled by these "reduced cholesterol" claims because foods so labeled could still contain relatively high levels of cholesterol and

would thus be inappropriate for a reduced cholesterol diet. These comments recommended that "reduced cholesterol" claims be permitted only for foods that meet the 75 percent reduction requirement and that do not exceed a specific maximum level of cholesterol. Conversely, a few comments requested that the percent reduction be only 30 or 50 percent because, they argued, 75 percent is unrealistic and technologically infeasible.

Consistent with the policy discussed in the preamble to the final sodium labeling regulations (49 FR 15510 at 15521), the agency does not consider "reduced cholesterol" claims and comparative claims to be redundant. "Reduced cholesterol" claims can be made for those foods in which the cholesterol levels have been very substantially reduced. Comparative claims, on the other hand, are appropriate for foods in which the cholesterol level has been reduced but not reduced enough to justify a "reduced cholesterol" claim. Thus, FDA is convinced that both claims are useful.

FDA is not requiring that foods bearing "reduced cholesterol" or comparative cholesterol claims contain less than the threshold levels of fat and saturated fatty acids. A food bearing a "reduced cholesterol" claim has a substantially reduced cholesterol level and thus can have a significant role in reduction of cholesterol in the diets of the general population. Similarly, foods qualifying for the use of comparative claims have a significant reduction in cholesterol compared to the counterpart food and thus provide a dietary benefit, relative to the counterpart, in diets that are intended to reduce cholesterol intakes of the general population. The agency, however, requests comments on whether it should also condition the use of these claims on the fat and saturated fatty acid content of the food.

The agency recognizes that some consumers could assume that a "reduced cholesterol" food is always appropriate for a cholesterol-restricted diet. FDA, however, points out that the purpose of the "reduced cholesterol" descriptor is to provide information facilitating the reduction of cholesterol in the diets of the entire population, not just those individuals who are on a cholesterol-restricted diet.

In addition, the requirement that the labels of all foods that bear a "reduced cholesterol" claim also declare the total cholesterol content of the food will minimize any possible consumer confusion in this regard and at the same time encourage manufacturers to make substantial reductions in cholesterol

levels in foods with higher cholesterol content. This effect will contribute to an overall reduction of cholesterol in the diet. The establishment of a maximum level of cholesterol for which a "reduced cholesterol" claim could be made would only serve to discourage such efforts. FDA also points out that even if such a maximum level were appropriate, no data were provided in the comments to support a specific maximum, and thus any such value selected would be arbitrary.

Finally, lowering the mandatory reduction requirement to 30 or 50 percent would undermine the agency's intent that the "reduced cholesterol" descriptor be reserved for those products that have accomplished a very substantial reduction in the level of cholesterol but that do not qualify for the use of other descriptors. As noted in the proposal (51 FR 42584 at 42589), the agency believes that food labeled as "cholesterol reduced" should provide a significant reduction in cholesterol in comparison with the food that it replaces. The requirement of a 75 percent reduction in cholesterol content as a precondition for use of the term "cholesterol reduced" reflects FDA's concern about the many foods that contain relatively large amounts of cholesterol, and about the possibility that products with relatively high levels of cholesterol could easily claim to have reduced cholesterol content if the agency permitted a lesser reduction to be reflected in the labeling. More than one-fourth of the cholesterol-containing foods examined by the agency (Ref. 8) contain more than 100 mg of cholesterol per serving. Of these foods, one-third contain more than 200 mg.

In addition, the 75-percent reduction requirement is technologically feasible, as evidenced by the fact that it has already been achieved for a few products such as egg substitutes and in light of rapidly developing technology. The agency is confident that manufacturers can achieve a 75-percent reduction in cholesterol for other products as advances are made in food technology and as public demand for these foods increases. Those food processors who cannot yet achieve the 75-percent reduction level may still direct consumer attention to lowered levels of cholesterol through the use of comparative claims.

Having considered all the comments on this issue, the agency has concluded that the definition for "reduced cholesterol" should be retained as proposed except that § 101.25(a)(2)(iii) has been editorially revised. The revised section states that the "reduced cholesterol" descriptor may be used on

"the label or in labeling of a food that has been specially formulated or processed to reduce its cholesterol content by 75 percent or more." The proposal had described the same conditions by stating that the "reduced cholesterol" descriptor may be used on "the label or in labeling of a food that has been specially formulated to contain a lower cholesterol content if such food is a substitute for \* \* \* a food containing at least four times its cholesterol content." The revised language makes parallel the descriptions of the conditions in which the "reduced cholesterol" descriptor can be used (75-percent reduction in cholesterol) and a comparative cholesterol statement can be made (25-percent reduction in cholesterol).

24. Several comments suggested that the reference points against which "reduced cholesterol" and comparative claims are to be made should be clarified in the final rule, so that uncertain or difficult to enforce standards of comparisons can be avoided, and that consistency between these reference points can be assured. The points of reference suggested in the comments were: (1) A regular brand, (2) an "industry-wide norm" (or market basket survey of comparable products), and (3) a similar product or class of products as found in recent applicable references such as the revised sections of Agriculture Handbook No. 8, "Composition of Foods, Raw, Processed, Prepared" (Ref. 22).

FDA agrees that acceptable reference points against which "reduced" or comparative claims are to be measured should be clearly understood by all parties. However, FDA finds that a change in the regulation is not necessary to assure the consistency sought by the comments. The agency believes that this consistency can be achieved by FDA's setting forth reference points that it considers appropriate and against which "reduced" or comparative claims should be measured. Accordingly, FDA has studied the comments and concludes that (1) an industry-wide norm, (2) a regular brand, or (3) a similar product or class of products as found in a current, valid, composite data base can all be used as appropriate reference points.

An "industry-wide norm" is a value determined by calculating, according to national market share, on a unit or tonnage basis, the weighted average cholesterol content of all the foods of the type in comparison to which, a cholesterol reduction is claimed. This definition of "industry-wide norm" utilizes a weighted average cholesterol content based on national market share

information that is readily available to both industry and government. To maximize consistency, the market share should be calculated according to unit or weight, rather than dollar sales.

As an example of the calculations for "industry-wide norm," if brand A has a market share of 75 percent and contains 100 mg of cholesterol per 10-ounce serving, and brand B has a market share of 25 percent and contains 200 mg of cholesterol per 10-ounce serving, then the industry-wide norm is 125 mg of cholesterol per 10-ounce serving. In this example, a "cholesterol reduced" substitute may contain no more than 31.25 mg cholesterol per 10-ounce serving, or 30 mg when rounded to the nearest 5-mg increment. If the serving sizes in a relevant market differ, the weighted average should account for this difference as well.

"A regular brand" is a food actually offered on a regular basis to the public for sale for a substantial period of time in the same geographic area by the same business entity, or by one entitled to use its trade name, as that selling the food for which a cholesterol reduction is claimed.

Comparisons may also be made to a similar product or class of products as found in a current, valid composite data base. The agency has a long history of encouraging industry to develop and maintain meaningful data bases and to submit information that it develops to the National Nutrient Data Bank maintained by the U.S. Department of Agriculture (USDA).

The agency recognizes that other reference points can be used to develop "reduced" or comparative claims that are not false or misleading. The agency has in the past evaluated data bases developed by industry for use as a basis for nutrition labeling of foods. The agency will continue to evaluate and to provide comments on such data bases. However, the reference points described above are the ones on which the agency will base its evaluation of the label claims for the product, unless the label clearly cites a different reference point. Furthermore, citation of the reference point on the label does not preclude an agency conclusion that that reference point produces results that are false and misleading.

#### D. Comparative Claims

25. Several comments expressed concern that the terms "lowered" and "less" that were suggested in the proposal for comparative claims were not clearly distinguishable from other defined terms and could therefore lead to consumer confusion and even deception. One comment urged that the

agency not allow products to bear the terms "less cholesterol" or "lowered cholesterol" until convincing survey data confirm that such terminology will not be confused with the "low" and "reduced" cholesterol categories. Other comments argued that FDA was deviating from its policy of standardizing labeling terms by allowing "less" and "lowered" to be used without specific definitions. Some of these comments recommended establishing a fourth category with defined terminology for comparative claims.

The agency agrees that consumers may have difficulty differentiating among "lowered," "reduced," and "less" if all of these terms were used as descriptors on foods. Use of all of these terms on a label or in labeling would likely be misleading. As a result, FDA has decided to modify the provisions on comparative claims to limit the comparative claims to quantitative information that compares the cholesterol content of a food with that of the food that it replaces on a per serving basis. In addition, the revised regulation, § 101.25(a)(2)(iv) (proposed as § 101.25(a)(3)(iv)), makes no provision for the use of terms like "lowered" or "less" as descriptors of the cholesterol content of a food. These terms may be used only in the comparative statement. For example, a manufacturer could label a product called "pound cake" to show that "this pound cake contains 35 percent less cholesterol than our regular pound cake (cholesterol lowered from 70 mg to 45 mg per serving)."

Agency policy regarding reference points against which comparative claims are made is the same as for "reduced cholesterol" claims, discussed in item 24 above.

26. A few comments requested that comparative claims be eliminated because the definition of "inconsequential reductions" was too vague and would be an inadequate guideline on which to base regulatory action. The comments expressed concern that such a vague policy would open the door to deceptive and misleading label claims and would have a negative impact on nutrition education efforts. Other comments suggested that a definition for "inconsequential" is needed. Most of these comments suggested definitions that were based on a specified minimum percent reduction (e.g., 20, 25, or 33 percent) of cholesterol in the product or a specified reduction in the absolute amount (e.g., 20 or 30 mg) of cholesterol in the product. One comment further suggested that the required reduction in the absolute amount of cholesterol be based on the frequency of consumption of the product.

The agency believes that comparative claims can play an important role in encouraging manufacturers to increase the availability of foods with lowered cholesterol content, and therefore it has not eliminated them. The agency did, however, specifically ask for comments on the "inconsequential reduction" issue and on the possibility of certain comparative statements being inherently misleading. FDA is persuaded by the comments that a specified reduction in cholesterol is necessary to prevent deceptive comparative claims and to help ensure that consumers are not misled into believing that an inconsequential reduction in cholesterol content will provide significant health benefits. The agency does not believe that an absolute reduction requirement (such as 20 or 30 mg) is an appropriate solution because it would permit comparative claims to be made for insignificant reductions in cholesterol levels in products with a substantial cholesterol content.

The agency finds that a specified minimum percentage reduction for all products, including those with relatively high cholesterol levels, is a more reasonable criterion. The agency has therefore concluded that a comparative label statement on a product is not false or misleading if there has been at least a 25 percent reduction in the cholesterol content of the product compared to the food for which it is a replacement. The agency finds that products in which there has been a 25 percent or greater reduction in cholesterol will serve a useful role in the diet of those individuals who are attempting to limit their cholesterol consumption. This criterion is also consistent with FDA requirements for comparative sodium claims (49 FR 15510 at 15521) and with the USDA guidelines that permit comparative fat claims for meat and poultry products when fat is reduced by 25 percent or more.

Accordingly the agency is revising § 101.25(a)(2)(iv) (proposed as § 101.25(a)(3)(iv)) by modifying the description of foods for which comparative claims are appropriate from "a food that has been formulated or processed to contain a lower cholesterol content but that has not achieved the reduction necessary to be labeled 'cholesterol reduced' \* \* \*" to "A food that has been formulated or processed to reduce cholesterol content by 25 percent or more \* \* \*."

27. One comment objected to the requirement in the proposal to place quantitative information adjacent to "reduced cholesterol" or comparative claims at each label location where a

claim is made. The comment argued that such a requirement is inconsistent with FDA's general labeling requirement that mandatory labeling appear either on the principal display panel or the information panel (§ 101.2(b)) and with regulations governing "reduced sodium" (§ 101.13(a)(4)) and "reduced calorie" (§ 105.66(d)(1)(ii)) claims.

The agency agrees with this comment. The agency believes that adequate quantitative information regarding the cholesterol content of the product will be provided because of the provisions of § 101.25(a)(2) (iii) and (iv). These sections provide that the term "cholesterol reduced" or comparative cholesterol information may be used on a food label provided that the label also bears, to explain the term "cholesterol reduced," clear and concise quantitative information comparing the product's cholesterol content per serving with that of the food it replaces and, to explain any comparative claims, information on the extent to which cholesterol was reduced.

Accordingly, for consistency with its general labeling requirement FDA is revising § 101.25(a)(2) (iii) and (iv) (proposed as § 101.25(a)(3) (iii) and (iv)) by removing the requirement that all labeling locations on or about the food where the term "cholesterol reduced" is used, or where the comparative information is presented, bear information comparing the product's per serving cholesterol content with that of the food it replaces.

#### E. Other Descriptive Terms

28. A few comments objected to the proposed use of "other descriptive terms which would further characterize the actual nature of the food" (51 FR 42584 at 42591). The comments expressed concern that such a policy would result in a "sort of free-for-all labeling" that would encourage merchants to make misleading claims that will confuse rather than clarify the issue for consumers. An additional comment recommended that FDA require a fatty acid declaration on products that make any claims related to fat, such as "made with 100 percent vegetable oil."

The agency disagrees with the comments opposed to the use of other descriptive terms. FDA believes that there is no basis for prohibiting the use of descriptive terms about a food that are not false or misleading. Furthermore, the agency believes that there are sufficient safeguards in place to ensure that manufacturers who elect to use informative label statements such as "made from 100 percent vegetable oil" or "no animal fat" will use prudence in making such claims. These safeguards

include the agency's surveillance of food labels and its actions against food products bearing false or misleading labels or labeling, as well as the requirement, discussed in the preamble to the proposal (51 FR 42584 at 42591), that any such descriptive term will trigger nutrition labeling, including cholesterol and fatty acid declaration, in conformity with § 101.9.

However, given the concerns expressed in the comments, the agency has decided to include in the regulation the conditions under which the use of such descriptive terms in food labeling would not be false and misleading. Inclusion of these provisions in the regulation is consistent with the proposal on cholesterol labeling. The issue of the use of other descriptive terms in food labeling was raised in the proposal, and the agency requested comments regarding the use of such terms (51 FR 42584 at 42591).

Accordingly, FDA is amending § 101.25 by redesignating proposed paragraph (c) as paragraph (d) and adding a new paragraph (c) to provide for the use of other descriptive terms that further characterize the cholesterol or fatty acid content of the food. The label of foods that bear these terms must, however, bear nutrition labeling in conformity with § 101.9, including quantitative information on total fat, fatty acid, and cholesterol content.

#### F. Limitations on Use of Defined Terms

29. A few comments objected to, or were confused by, the requirement in proposed § 101.25(a)(3) (i)(a) and (ii)(a) that a food inherently free of, or low in, cholesterol may be labeled with a cholesterol claim only if such labeling clearly refers to all foods of that type and not merely to the particular brand to which the labeling attaches, e.g., "applesauce, a cholesterol free food." The comments argued that such a limitation could be misleading because an entire class of processed foods (such as margarine) could appear to be cholesterol free when made with vegetable oils and labeled "margarine, a cholesterol free food," while some other margarines could be made with animal fats and therefore would not be cholesterol free. The same situation, the comments claimed, can exist with other categories of food that can be processed with or without cholesterol-containing ingredients (e.g., shortening, potato chips). The comments stated that the label should be able to bear a claim without having to modify the claim to reflect that the entire generic group of foods is free of, or low in, cholesterol. Some comments also saw this requirement as a cumbersome precedent

for labeling other food characteristics, such as calories, fat, and sodium; as a restraint that would restrict freedom and originality of product representation; and as a requirement that manufacturers give, in effect, free advertising to their competitors.

FDA continues to believe that unrestricted use of the defined terms on products that are inherently free of, or low in, cholesterol can be misleading. Accordingly, the agency will require, as it proposed, that claims on such foods that meet all criteria for use of the terms refer to all foods of that type and not merely to the particular brand to which the labeling is attached, e.g., "applesauce; a cholesterol free food." The agency never intended that this requirement apply to products that sometimes are made with animal fats which contain cholesterol. To alleviate the concern expressed in the comments, the agency advises that this requirement applies only to those products that are free of, or low in, cholesterol as ordinarily grown or processed, such as canned fruits and vegetables. Because, if this tentative final rule is adopted, manufacturers will no longer be able to make "cholesterol free" and "low cholesterol" claims on foods that exceed the threshold levels for fat and saturated fatty acids, the concerns expressed over the use of these claims on foods such as margarines and shortening need not be addressed further (see also comment 18, above).

This requirement is consistent with the policy set forth in § 105.66(c)(2) for low calorie foods and discussed in the preamble to the final rule on sodium labeling in relation to low sodium foods (49 FR 15510 at 15517). The agency does not see this requirement as restricting freedom or originality of product representation or as requiring that manufacturers give free advertising to their competitors. Rather, it is necessary to prevent the consumer from being misled by an implication that a particular food has been altered to lower its cholesterol content with respect to other foods of the same type when, in fact, all such foods are naturally free of, or low in, cholesterol.

Therefore, FDA is retaining the proposed requirement that claims on foods inherently free of, or low in, cholesterol refer to all foods of that type and not merely to the particular product making the claim. The agency is, however, revising proposed § 101.25(a)(3) (i) and (ii), redesignated as § 101.25(a)(2) (i) and (ii), to simplify the language in these sections and to maintain consistency wherever possible with the language in regulations

pertaining to the use of sodium descriptors (21 CFR 101.13).

29a. The agency has reviewed this requirement regarding claims on foods inherently free of, or low in, cholesterol in conjunction with the broader labeling issue of the use of descriptors in association with the name or statement of identity of foods. The agency would like to reiterate that, in accordance with the policy discussed in the preamble to the proposed regulation, the defined cholesterol descriptors may be used in association with the names of standardized and nonstandardized foods (except for those foods that are inherently free of, or low in, cholesterol). The agency notes that, for most standardized foods, a change in cholesterol content does not in and of itself change the character and nature of the food such that the food is no longer the standardized food. Thus, for most of these foods, the use of descriptors in conjunction with their standardized names will not create common or usual names that will take the food out of the standard for the purposes of § 101.3(e). For these foods, the descriptor merely points out the special property (i.e., the cholesterol content) of the food.

Consequently, use of the same lettering for the descriptor and for the standardized name may be misleading because it would imply that the food is not the standardized food, but a different food that does not meet the requirements of the standard. Therefore, when cholesterol descriptors are used in conjunction with a standardized name, they should be distinguished from that name by type, color, style of lettering, or type size in order to clearly differentiate the identity of the food from the cholesterol claim.

If the modification in a food (e.g., a reduction in the amount of animal fat) leads not only to a significant reduction or elimination of cholesterol but also to the creation of a food that differs substantially in organoleptic or other properties from the original food, the name of the food must be modified by additional appropriate terms as set forth in § 101.3(e). These additional terms advise consumers that the food differs from the original product in more than just cholesterol content.

#### G. Serving Size

30. Several comments suggested that standard serving sizes are needed to prevent manufacturers from manipulating the serving size declaration to lower the labeled cholesterol content.

FDA is concerned about potential inappropriate manipulation of serving

size to lower the labeled cholesterol content. However, the issue of serving size goes beyond cholesterol labeling and extends to all issues of nutrition labeling and descriptor labeling. Therefore, in a companion document in this issue of the Federal Register the agency is proposing regulations to standardize serving sizes. Standard serving sizes were not the subject of the November 1986 proposal.

As for the matters covered in this proceeding, the definition for "low cholesterol," which contains dual evaluation criteria, including one that is based on the amount of cholesterol per g of product, will prevent inappropriate use of the "low cholesterol" descriptor resulting from manipulation of serving size. The agency does not believe serving size manipulation can occur as readily for "cholesterol free" and "reduced cholesterol" products because the definition of (1) "cholesterol free" (less than 2 mg cholesterol per serving) is so low that few foods could have their serving sizes reduced sufficiently to allow for misleading use of the descriptor, and (2) "reduced cholesterol" is based on percentage reduction and manipulation of the serving size by the manufacturer would have no effect on such a descriptor. An additional deterrent to reducing serving sizes is that manufacturers would have to express a lower content for all the other nutrients on the nutrition label.

31. A number of comments suggested that labeling claims regarding cholesterol content be expressed as "per 100 grams" or "per package" in lieu of "per serving" so as to discourage manipulation of serving sizes. Conversely, a petition received from Arthur A. Checchi, Inc. (March 14, 1986, docket number 86P-0126/CP), requested that the agency permit cholesterol content labeling on a per serving basis only.

The agency again finds these comments beyond the scope of this rulemaking. As explained in item 30 above, elsewhere in this issue of the Federal Register, FDA is requesting comment on serving size as the basis for nutrition labeling and descriptor labeling. The agency is now retaining the "per serving" descriptor for expressing cholesterol content contingent upon any final action taken on serving sizes. The agency has deleted § 101.25(b)(2)(ii) which required that cholesterol content also be expressed in terms of the number of mg per 100 g of food.

### III. Fatty Acid Declaration

#### A. Labeling Requirements

32. Several comments objected to the proposed requirement that making any type of claim about the fatty acid or cholesterol content of a food on the principal display panel would trigger declaration of both in nutrition labeling. One comment expressed the opinion that the declaration of fatty acids should be required in nutrition labeling only when a cholesterol descriptor such as "low cholesterol" is used and not when the amount of cholesterol present is merely included in nutrition labeling. Other comments were opposed to requiring a fatty acid declaration under any circumstance. The latter comments were concerned that requiring fatty acid declaration would be a powerful disincentive to provide cholesterol labeling because it would force manufacturers to select one specific oil or to maintain many labels because the fatty acid profile of a food can change whenever fats or oils were substituted.

The agency finds that declaration of both cholesterol and fatty acid content in nutrition labeling when a cholesterol claim is made is necessary to prevent consumer deception. Because both dietary constituents play an important role in regulating serum cholesterol levels, quantitative disclosure of one without the other would undermine the integrity of the nutrition labeling concept which requires complete disclosure of the key nutritional properties of a food, so that consumers are not misled by the labeling and can intelligently select a food on the basis of those properties. For example, a quantitative declaration of cholesterol content on the label of a processed food that is relatively high in saturated fat, such as certain coffee whiteners or nondairy sour cream, can be misleading unless the saturated fat level is also stated on the label. The agency has, therefore, concluded that the requirement that fatty acids be declared in nutrition labeling whenever cholesterol information is provided (and the food product contains enough fat to influence total intake of fatty acids) should be retained regardless of whether a cholesterol claim is made on the principal display panel.

The agency recognizes that requiring fatty acid labeling may discourage some manufacturers from making cholesterol claims, particularly when disjunctive ("and/or") labeling of fats and oils is used in the ingredient list. However, comments did not provide data that support the premise that substituting one fat or oil in a product for another fat

or oil would necessarily change the fatty acid profile of the finished product. Oils must often be hydrogenated to meet the technological requirements of a particular food product. The hydrogenation process converts many polyunsaturates to monounsaturates or saturates, resulting in somewhat similar fatty acid profiles for the fats or oils that are used interchangeably in a particular product. Consequently, the substitution of one type of fat or oil for another may or may not necessitate a change in label declaration. Accordingly, the agency has not revised the requirement for concurrent cholesterol and fatty acid labeling whenever the food product contains more than a specified minimal amount of fat.

33. Some comments favored, while others opposed, the requirement that the threshold level of fat at which fatty acid labeling is required if cholesterol information is provided be measured, in part, on a "dry weight" basis. The comments opposing this requirement argued that the use of dry weight measurements is not meaningful to, or practical for, consumers.

The agency is not persuaded that a change in the requirement of dry weight measurement for fat content is necessary or warranted. FDA does not consider the meaningfulness and practicality of this information to consumers to be an issue. This information was never intended to be provided to consumers. A manufacturer who wants to provide cholesterol information to consumers must make these dry weight measurements only for that small percentage of products that contain more than 2 g of fat per serving but for which it is not readily apparent whether they contain 10 percent fat on a dry weight basis.

Moreover, as a comment from a supermarket chain with experience in nutrition and shelf labeling programs pointed out, a dry weight requirement is useful to prevent manufacturers from manipulating serving sizes to meet the criteria for claims. The use of this type of requirement prevents manipulation of serving sizes by the addition of water to a food product. Accordingly, for the foregoing reasons, the agency has retained the dry weight measurement requirement.

34. A number of comments expressed the opinion that the threshold level of 2 g of fat per serving was too restrictive for triggering fatty acid declaration because it would require foods that contribute little fat to the diet to list fatty acid composition information. One comment was concerned that defining low fat at this level would be incompatible with current FDA

standards such as lowfat milk, lowfat yogurt, and lowfat cottage cheese (21 CFR 131.135, 131.203, and 133.131) that define a maximum fat level of 2 percent which equates to 4.7 g per 8-ounce serving. Several comments favored raising the threshold level to 5 g fat per serving. This suggestion was based, in part, on calculations that 5 g is the average amount of fat per serving that would result in a typical diet (consisting of approximately 2,350 calories and an average of 18 servings of foods eaten per day) containing the currently recommended 30 percent of calories from fat. Conversely, other comments thought the threshold level was too lenient. One comment suggested lowering the 2 g threshold level to 0.5 g so that labels of nearly all foods with hidden (or unsuspected) fat content would be required to declare fatty acid content.

The agency is not persuaded that a change in the threshold level for triggering fatty acid declaration is necessary or warranted. FDA finds that a 5 g threshold level is too high because it would exclude from fatty acid declaration foods that, in the agency's estimation, contain a sufficient amount of fat to warrant informing consumers who wish to regulate their intake of fatty acids. The importance of this information is underscored by the fact that some manufacturers are voluntarily choosing to make a cholesterol claim (or to include quantitative information on cholesterol on the nutrition label), thereby indicating that product marketing is being directed at the very population most interested in fatty acid content information.

The agency recognizes that the suggested 5 g per serving threshold represents the average amount of fat per food that would result in a typical diet containing the currently recommended 30 percent of calories from fat (assuming 2,350 calories). However, this does not take into account the fact that generally several foods consumed each day contain more than 5 g fat per serving (Refs. 22 through 24). Therefore, the remaining foods must contain less than 5 g in order to maintain a total daily intake of 30 percent or less of calories from fat. Additionally, consumers who wish to have, for specific health reasons, a fat intake of less than that that is recommended for the average person would be expected to find fatty acid content information helpful on foods containing less than 5 g fat per serving.

With respect to the comment expressing concern that this threshold level of 2 g is incompatible with the level of fat in several standardized foods, the agency points out that it is not

defining "low fat" in this document. It is merely setting a threshold level over which fatty acid contents must be declared when cholesterol content is specified. The agency will address definitions relating to fat content in a future rulemaking.

Finally, FDA is proposing elsewhere in this issue of the Federal Register that saturated fatty acid content be a required element of mandatory nutrition labeling. If made final as proposed, the issue of a 2 g fat per serving (or 10 percent fat on a dry weight basis) threshold for fatty acid declaration will become moot. In the meantime, the agency advises that the amount of total fat will continue to be included in nutrition labeling that is provided and thus will alert consumers that a small amount of fat is present in the food.

It was evident from the comments that there was confusion about the inclusion or exclusion of the specific number in the threshold level (i.e., "less than 2 g" or "2 g or less"). In accordance with comments recommending inclusion of the specific number and consistent with changes made in the definition of "low cholesterol" (see item 21 above), the agency is modifying the threshold level given in new § 101.9(c)(6)(ii) to specify "2 g or less fat in a serving" and "10 percent or less fat on a dry weight basis."

35. Several comments suggested that the declaration of fatty acid levels should be allowed on all foods. They argued that prohibiting disclosure of fatty acid content on foods with less than 2 g fat per serving and less than 10 percent fat on a dry weight basis worked against the intent of the regulations which is to encourage consumer knowledge and good dietary practice.

The agency agrees that allowing labeling of fatty acid content on foods containing less than 2 g fat per serving and less than 10 percent fat on a dry weight basis is a logical and consistent outgrowth of its intent to provide maximum information to consumers regarding the fat, fatty acid, and cholesterol content of food. Product labels that provide nutrition labeling information on the fatty acid content of foods containing less than 2 g fat per serving and less than 10 percent on a dry weight basis are not misleading. Accordingly, FDA is revising proposed § 101.25(b)(1) to permit fatty acid declaration within the nutrition label on all foods on a voluntary basis. To streamline the regulations, proposed § 101.25(b)(1) has been moved to § 101.9(c)(6)(ii).

36. One comment requested that FDA clarify its position on the threshold for mandatory fatty acid declaration when cholesterol information is provided.

In the proposal, the threshold was used for two purposes. Under proposed § 101.9(c)(6)(ii), this threshold established the level of fat at or above which declaration of fatty acid content was mandatory in conjunction with the declaration of cholesterol content. In addition, proposed § 101.25(b) provided that a fat content at or above this threshold was a necessary precondition for voluntary declaration of the fatty acid content of a food. The proposed change was intended to expand the opportunity for voluntary fatty acid labeling for food products but still retain a threshold level. However, the agency is now providing for voluntary fatty acid labeling for all foods without regard to the amount of fat present (see item 35 above).

In this rulemaking the agency is maintaining its current threshold for mandatory fatty acid labeling because the agency concludes that this threshold embodies the level of fatty acids in a product that is nutritionally significant. The agency believes that a statement on the label regarding the fat, fatty acid, or cholesterol content of a food containing fat at or above this level would be misleading without quantitative fatty acid labeling because it would fail to provide material facts regarding the nutritional value of the food.

However, elsewhere in this issue of the *Federal Register*, FDA is proposing that saturated fatty acid content become a mandatory component for all nutrition labeling. Pending final action on this proposal, FDA is withdrawing the proposed change regarding the mandatory declaration of fatty acid content when cholesterol content is given and returning to the existing requirement that only food products that meet both criteria must bear fatty acid labeling when cholesterol information is given. This revision has been implemented in § 101.9(c)(6)(ii) by revising that provision to state that, "When fatty acid or cholesterol content is declared, both shall be declared \* \* \* except that products that contain 2 g or less fat in a serving or 10 percent or less fat on a dry weight basis need not include fatty acid information."

37. Several comments urged that FDA require or permit the inclusion of monounsaturated fatty acids as part of the fatty acid declaration. They pointed to increasing consumer interest, generated in part by recent recommendations (Ref. 18) that at least one-third of total fat should be provided

by monounsaturates. Comments enclosed recent scientific publications that suggest that monounsaturates may have a lowering effect on serum low density lipoprotein cholesterol (LDL-cholesterol). Comments also suggested that consumers are confused because the amount (g) of saturates and polyunsaturates does not generally add up to the total g of fat on nutrition labels. They expressed hope that including the grams of monounsaturates would remedy the situation.

FDA is persuaded that the inclusion of monounsaturates as a part of the fatty acid declaration could be of interest and assistance to some consumers. Accordingly, the agency will not object if manufacturers include this information immediately following the declaration of polyunsaturated fatty acids and immediately before the declaration of saturated fatty acids in nutrition labeling.

The agency has modified its final rule by adding new § 101.9(c)(6)(ii)(a)(2) to provide for the voluntary declaration of *cis*-monounsaturated fatty acids, stated as "Monounsaturated," as part of fatty acid declaration in nutrition labeling. (The requirement for fatty acid declaration in nutrition labeling was proposed in § 101.25(b)(2), but to streamline the regulations, this section has been moved to § 101.9(c)(6)(ii)(a).)

Persons studying label values or involved in nutrition education programs should be aware that the declared grams of polyunsaturates, monounsaturates, and saturates may still not add up to the total grams of fat in a serving. The definitions of monounsaturates and polyunsaturates exclude *trans* fatty acids and nonfatty-acid lipid components, and the definition of saturates includes only four fatty acids (lauric, myristic, palmitic, and stearic).

38. One comment suggested using the term "unsaturates" to represent both monounsaturated and polyunsaturated fatty acids. Other comments suggested that monounsaturates should be defined as "oleic acid," "straight-chain fatty acids containing one double bond," or "*cis*-monounsaturated fatty acids."

The agency intends to give further consideration to the comment that suggested the use of the term "unsaturates." While FDA does not believe it is appropriate to insert it in this final rule, the agency is proposing, elsewhere in this issue of the *Federal Register*, to permit the use of the term "unsaturated" as an alternative to separate declarations of polyunsaturated and monounsaturated fatty acids.

In regard to the definition of monounsaturated fatty acids, the agency believes the term "oleic acid" and "straight-chain fatty acids containing one double bond" are too limiting because monounsaturated fatty acids of other chain lengths (such as palmitoleic acid) function similarly. Therefore, the agency has concluded that monounsaturates should be defined as "*cis*-monounsaturated fatty acids" to exclude geometric (or *trans*) isomers of monounsaturates until more is known of the role that *trans* fatty acids play in human metabolism. This conclusion is consistent with the definition of polyunsaturates in former § 101.25(c)(2)(ii)(a) (now § 101.9(c)(6)(ii)(a)(1)).

39. A few comments requested that FDA permit the voluntary differentiation of polyunsaturates into omega-3 and omega-6 fatty acids. The comments argued that the additional information was necessary for consumers to intelligently select a food on the basis of its nutritional properties.

The agency disagrees. The nutritional role of omega-3 and omega-6 fatty acids is not understood and is still the subject of considerable research. Until more is known, and education programs are developed to inform consumers of the nutritional role and recommended levels of omega-3 and omega-6 fatty acids, inclusion of such information could be confusing to most consumers and potentially misleading.

In addition, few consumers are aware that the omega fatty acids are included under the current definition of "polyunsaturates." Removing them from that definition and declaring them separately may mislead many people about the polyunsaturate content of the product. However, continuing to include them under the definition of "polyunsaturates" while listing them separately as omega fatty acids could also mislead consumers about the polyunsaturate level (if they added all the values and got a sum larger than the whole). Accordingly, the agency has not made the suggested change.

40. One comment requested that stearic acid be deleted from the list of fatty acids collectively defined as "saturated" in § 101.9(c)(6)(ii)(a)(3) (proposed as § 101.25(b)(2)(ii)). The comment explained that stearic acid was shown by Keys et al. (Ref. 25), and Mattson (Ref. 26) to be neutral in its effects on serum cholesterol.

The agency acknowledges that the studies cited in the comment, as well as more recent research (Ref. 27), suggest that dietary stearic acid may have no effect on serum cholesterol when

consumed as part of a normal diet. However, the agency also notes that dietary recommendations to reduce saturated fatty acid intake to less than 10 percent of calories (Refs. 2, 3, and 9) do not exclude stearic acid from the collective term "saturated fatty acids." Accordingly, deleting stearic acid from the definition of saturated fatty acids for nutrition labeling purposes, without modifying dietary recommendations, would underrepresent the contribution of individual food products toward meeting the dietary recommendations with respect to saturated fatty acids. Therefore, FDA concludes that the definition of "saturated fatty acids" should not be changed at this time. However, the agency specifically requests comments on the definition of "saturated fatty acids" elsewhere in this issue of the Federal Register, in the proposed rule entitled "Food Labeling: Mandatory Status of Nutrition Labeling and Nutrient Content Revision."

41. One comment requested that *trans* isomers of fatty acids be included in the fatty acids collectively defined as "polyunsaturates" in § 101.9(c)(8)(ii)(c)(1) (proposed as § 101.25(b)(2)(i)). Other comments argued that *trans* fatty acids behave similarly in the diet to saturates and should be declared as a separate entity on the nutrition label.

FDA believes that there is no basis for including *trans* fatty acids in the fatty acids collectively defined as "polyunsaturates" or "monounsaturates." Scientific evidence reveals that the behavior of *trans* isomers of fatty acids is sufficiently different from that of the *cis* isomers to justify the exclusion of *trans* isomers from the definitions of "polyunsaturated" and "monounsaturated."

The agency also believes that there is no basis for declaring *trans* fatty acids as a separate entity on the nutrition label. A 1985 report by the Federation of American Societies for Experimental Biology on the health aspects of dietary *trans* fatty acids (Ref. 28) states that there are no immediate safety issues as a result of consuming *trans* fatty acids at current levels. Furthermore, a separate declaration of *trans* fatty acids in fatty acid declarations would complicate the nutrition label and confuse most consumers because very few, if any, large scale nutrition education programs have discussed geometric isomerism of fats (i.e., *cis* versus *trans* isomers) and its effect on the metabolism and function of fatty acids. Accordingly, the agency has not made the requested change. It should be

noted that, for reasons discussed in item 37 above, the declared grams of polyunsaturates, monounsaturates, and saturates may not add up to the total grams of fat in a serving.

42. One comment suggested that the fatty acids should appear, as do other components of food products, in nutrition labeling in their order of predominance.

FDA is denying this request. Section 101.9 does not permit any component of food products to be listed in nutrition labeling in the manner suggested by the comment. It appears that this comment has confused the requirements for nutrition labeling with those for ingredient labeling which require ingredients to be listed in the ingredient statement in their order of predominance, by weight. Therefore, the agency has not modified the final rule in response to this comment.

43. A few comments requested that the percent of fat that is saturated, monounsaturated, and polyunsaturated be specified in nutrition labeling.

FDA does not believe that this information is essential to the dietary management of fat intake. Knowledge of the percent of fat intake that is composed of saturated, monounsaturated, or polyunsaturated fatty acids is only useful in measuring total dietary intake of fat in an effort to meet recommendations that the daily diet be composed of less than 10 percent of calories from saturates, 10 to 15 percent from monounsaturates, and up to 10 percent from polyunsaturates (Refs. 2, 3, and 19). This information is not particularly useful when applied to individual foods. To accurately determine the fatty acid percentages for the fat consumed during the day, a person would have to calculate the total amount of fat and of each type of fatty acid consumed. This information would then need to be related to the total calorie intake per day. These computations are not made simply and may require professional assistance. Accordingly, the agency has not made the requested change.

#### B. Deletion of Percent Calories from Fat

44. Several comments expressed the opinion that percent of calories from fat should be retained as part of the label information. The comments stated that information on the percent of calories from fat offers consumers a quick guide to estimating relative amounts of fat at the point of purchase. These comments argued that the inclusion of percentage of calories from fat on labels: (1) is not a hardship to industry, (2) requires no additional space inasmuch as most labels include it on the same line as

grams of fat, and (3) is better understood by consumers than grams. These comments stated that consumers cannot be expected to know how to calculate the percent of calories from fat from the grams of fat and number of calories given on the nutrition label.

As discussed in the preamble to the proposed rule, the agency believes that information on percent of calories from fat is only valuable in measuring total daily intake of fat. Recommendations made by various health organizations to limit the dietary intake of fat to 30 percent of calories pertain to the entire day's intake, not individual foods. It is not possible to use information on the percent of calories from fat on individual foods to calculate the total percent of calories from fat from a complete day's diet. Such a calculation is accomplished by using the calorie and fat (g) information provided through nutrition labeling or nutrient composition reference tables for each individual food consumed during a day. The agency agrees that compiling this information can be a difficult task for many consumers and accordingly urges that nutrition education programs place emphasis on the maximum number of g of fat recommended per day at varying calorie levels, rather than on a percentage goal. FDA and USDA have already incorporated into consumer education materials tables of the recommended daily maximum amount of fat according to caloric intake (Refs. 29 and 30). FDA is pleased to see more organizations publishing similar tables (Ref. 31) as well as simple arithmetical methods for determining this quantitative goal (Ref. 32) and will encourage others to do likewise.

Inasmuch as no data were submitted by the comments to demonstrate that the mandatory inclusion of the percent of calories from fat on individual foods is essential to the dietary management of fat intake, the agency is removing this requirement as proposed. This action does not preclude manufacturers from providing this information voluntarily.

#### C. Claims on Foods for Children

45. Several comments concerning cholesterol claims and quantitative information on cholesterol and fatty acid levels on foods marketed for children under 2 years of age expressed the view that changing the diet of these children toward a more restrictive dietary pattern should await demonstration that such dietary restrictions are needed and would support adequate growth and development. One comment requested that foods intended specifically for

infants and toddlers less than 2 years of age should be excluded from quantitative cholesterol labeling so as to discourage application of prudent adult dietary recommendations to infants and toddlers, thereby encouraging the provision of a varied diet including each of the major food groups.

The agency agrees with these comments. Accordingly, FDA is amending § 101.25 by adding paragraphs (a)(1)(ii) and (b)(2) to exclude the use of descriptors and quantitative cholesterol and fatty acid labeling on foods specifically intended for use by infants and toddlers less than two years of age.

#### IV. Palm, Palm Kernel, and Coconut Oils

46. The agency received two citizen petitions relating to palm, palm kernel, and coconut oils (referred to as "tropical oils"). The Center for Science in the Public Interest (CSPI) submitted a petition that was filed on August 8, 1986 (Docket No. 86P-0345/CP). The American Soybean Association (ASA) submitted a petition (Docket No. 87P-0026/CP) that was filed on January 27, 1987, and amended on May 20, 1987, and February 25, 1988.

The agency informed the petitioners that it would consider these citizen's petitions as part of its final rule on cholesterol labeling. However, in reviewing the petitions, and the comments received on these petitions, the agency has concluded that the issues discussed are related to specific products and not to the proposed rule for cholesterol labeling of food. The agency finds that these petitions, and the comments received relating to them, are more appropriately discussed in a separate agency action. Therefore, the agency is not considering these petitions and the comments received on them as part of this rulemaking but will address them separately.

#### V. Multicomponent Meals

47. A number of comments requested that the term "meal" be defined. Other comments requested that definitions related to meals be put into the regulation, rather than remaining as guidelines only, and supported the development of similar definitions for multicomponent meals "free" or "low" in sodium, fat, and calories. Additionally, some comments requested changes in the quantitative definitions of "cholesterol free meal" and "low cholesterol meal" suggested in the preamble to the proposal.

The agency has reconsidered its position and is persuaded that the lack of a clear definition of "meal" is a barrier to FDA's promulgation of guidelines or regulations to define

"cholesterol free meal" and "low cholesterol meal." Nonetheless, the agency has not attempted to define "meal" as it would pertain to "cholesterol free meal" and "low cholesterol meal" because it does not have sufficient information on which to base a comprehensive policy. Interested parties with information on consumer understanding of the term "meal" and on the use of products marketed as a complete meal are encouraged to submit a petition supported with adequate data that would assist the agency in developing this policy.

#### VI. Miscellaneous

48. One comment requested that the agency update the analytical method for fatty acids that was specified in proposed § 101.25(e)(3) from that that appears in the 13th Ed. of the "Official Methods of Analysis of the Association of Official Analytical Chemists" to the latest edition.

The agency agrees. However, inasmuch as the requirements concerning the quantitative declaration of cholesterol and fatty acids have been moved to § 101.9(c)(6) (see item 6 above), the agency has decided for completeness and convenience to move all compliance requirements to § 101.9. Accordingly, FDA has removed the section proposed as § 101.25(e). Former § 101.25(e) (1) and (2), which relate to definitions of "lot" and "sample for analysis," were repetitions of existing § 101.9(e) (1) and (2), and therefore their incorporation into § 101.9 was unnecessary.

Former § 101.25(e)(3), which describes the methods of analysis for fat, fatty acids, and cholesterol, is moved to § 101.9(c)(6)(iii) and is editorially revised to be consistent with discussions of methods of analysis for other nutrients in § 101.9. The agency also notes that FDA's "Lipid Manual" (1989) (Ref. 33) (formerly "Interim Methodology Instructions #2 for Implementing Requirements of § 1.8 of title 21, chapter 1, subchapter A, part 1 ("Labeling of Foods in Relation to Fat, Fatty Acid, and Cholesterol Content")" issued June 11, 1974), also contains reliable and appropriate methods for analysis of fat, fatty acids, and cholesterol.

New § 101.9(e)(5), which describes the compliance standard under section 403(a) of the act for misbranding of food products with label declarations for calories, carbohydrates, fat, cholesterol, or sodium, incorporates the provisions of former § 101.25(e) (4) and (5), which contained compliance standards for, respectively, cholesterol and fat. Former § 101.25(e)(6), which describes the

compliance standard under section 403(a) of the act for misbranding of food products with a label declaration for fatty acids, is moved to § 101.9(e)(6). The former § 101.9(e)(6) is redesignated as (e)(7).

49. Two comments suggested that FDA coordinate actions with USDA and the Federal Trade Commission (FTC) and issue a joint policy statement that encompasses both labeling and advertising practices.

FDA has and will continue to work closely with both USDA and FTC on the entire matter of food labeling and cholesterol labeling in particular. In fact, the promulgation of this regulation on cholesterol labeling was initiated as a result of joint FDA, USDA, and FTC hearings to elicit public comments on improving food labeling (see the advanced notice of proposed rulemaking published in the Federal Register of December 21, 1979 (44 FR 75990)). The agency has concluded that a second joint statement is unnecessary. However, FDA and USDA have undertaken a new initiative, as a result of the Surgeon General's Report on Nutrition and Health (Ref. 1), to review the total content of food labels. Labeling policies will be addressed in an effort to harmonize, wherever possible, the labels of foods regulated by the two agencies and to increase their usefulness to consumers.

50. One comment requested that phytosterol, a plant sterol, be included in nutrition labeling when fats and cholesterol are specified.

The agency has no data, nor were any submitted, to support this requested change. Therefore, no change in the final rule has been made.

51. A few comments stressed the need for minimum type-size requirements, particularly within nutrition labeling, so that consumers will be able to easily read the actual amounts of cholesterol and fatty acids present in a serving.

FDA has long struggled with the problem of print size for required label statements. Current labeling regulations establish minimum type sizes (§ 101.2). However, even these sizes may be too small for consumers with poor eyesight. On the other hand, label space for required and optional label statements is limited for many foods, so that it is often difficult to provide the information in the required print size. However, this is an issue more related to the format in which label information is presented than it is to the proper use of label terms to describe the cholesterol content of foods. As such, the issue of type size is beyond the scope of the current document. In an ANPRM of August 8,

1989, FDA called for comment on a number of aspects of the food label, including label formats. Accordingly, type size will be addressed, along with other format issues, within the scope of the current food labeling initiatives.

52. Two comments stated that this final rule should be delayed pending final regulations on health claims labeling.

FDA disagrees. The terms defined in this rule are descriptors characterizing the actual nature of the food and should not be confused with health-related claims or information concerning health benefits that can come from adhering to a nutritious diet.

53. One comment suggested that nutrition and health education programs are more appropriate than labeling initiatives for disseminating information on complex medical/nutritional issues involving chronic diseases.

FDA agrees that educational programs are an important mechanism for disseminating information on complex medical/nutritional issues involving chronic diseases. The agency believes that such programs must continue to educate consumers on proper food selection. However, the agency believes that food labels can also play an important role in assisting consumers in making proper food choices.

54. A few comments requested label information that would reinforce the "Dietary Guidelines for Americans" published by USDA and the Department of Health and Human Services and that would state that the recommended cholesterol intake is 300 mg or less per day.

FDA has concluded that it is not practical, because of space limitations, or necessary to require that this information be placed on food labels. The agency does not object if manufacturers voluntarily provide such additional information on the label or in accompanying labeling material as long as it is in conformity with applicable FDA regulations.

## VII. References

The following information has been placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, and may be seen by interested persons between 9 a.m. and 4 p.m. Monday through Friday.

1. "The Surgeon General's Report on Nutrition and Health," DHHS (PHS) Publication No. 88-50210 (GPO Stock No. 017-001-00465-1), U.S. Government Printing Office, Washington, DC, 1988.
2. Committee on Diet and Health, Food and Nutrition Board, Commission on Life

Sciences, National Research Council, "Diet and Health, Implications for Reducing Chronic Disease Risk," National Academy Press, Washington, DC, 1989.

3. National Cholesterol Education Program Report of the Expert Panel on Population Strategies for Blood Cholesterol Reduction (Population Panel), National Heart, Lung, and Blood Institute, DRAFT, February 20, 1990.

4. Levy, A.S. et al., "Recent Trends in Beliefs about Diet/Disease Relationships: Results of the 1979-1988 FDA Health and Diet Surveys," presented at FDA/USDA Food Editors Conference, December 1-2, 1989.

5. Subcommittee on the Tenth Edition of the RDA's, Food and Nutrition Board, Commission on Life Sciences, National Research Council, "Recommended Dietary Allowances," 10th Edition, Washington, DC, National Academy Press, 1989.

6. Interagency memorandum from Connie Marie Dresser, National Center for Health Statistics, to Marilyn Stephanson, FDA, December 3, 1981.

7. Human Nutrition Information Service, "Nationwide Food Consumption Survey of Food Intakes by Individuals, 1986," NFCS, CSFII Report No. 88-3, U.S. Department of Agriculture, Hyattsville, MD, September 1988.

8. FDA's Cholesterol Content Information Tables.

9. Nutrition Committee and Council on Arteriosclerosis, American Heart Association Special Report, "Recommendations for Treatment of Hyperlipidemia in Adults," *Circulation*, 69:1065A-1069A, 1984.

10. Consensus Panel for Lowering Blood Cholesterol to Prevent Heart Disease, Consensus Development Conference Statement, Office of Medical Applications of Research, National Institutes of Health, Bethesda, MD, Vol. 5, No. 7, 1984.

11. Inter-Society Commission for Heart Disease Resources, "Optimal Resources for Primary Prevention of Atherosclerotic Diseases," *Circulation*, 70:153A-205A, 1984.

12. World Health Organization, "Prevention of Coronary Heart Disease," World Health Organization Technical Report Series 678, Geneva, 1982.

13. "Healthy People, the Surgeon General's Report on Health Promotion and Disease Prevention," Department of Health, Education, and Welfare, DHEW Pub. No. 79-55071, pp. 128-131, 1979.

14. U.S. Department of Agriculture and U.S. Department of Health and Human Services, "Nutrition and Your Health, Dietary Guidelines for Americans," Home and Garden Bulletin No. 232, U.S. Government Printing Office, Washington, DC, 1985.

15. Heimbach, J. T., "Public Understanding of Food Label Information," FDA, HFF-240, 200 C St. SW., Washington, DC; May 1982.

16. Levy, A.S. et al., "The Impact of a Nutrition Information Program on Food Purchases," *Journal of Public Policy and Marketing*, 4:1-13, 1985.

17. Levy, A.S. et al., "Nutrition Shelf-Labeling and Consumer Purchase Behavior" (in press).

18. Nutrition Committee, American Heart Association, "Position Statement, Dietary Guidelines for Healthy American Adults," *Circulation*, 74:1465A-1468A, 1986.

19. Nutrition Committee, American Heart Association, "Position Statement, Dietary Guidelines for Healthy American Adults," *Circulation*, 77:721A-724A, 1988.

20. Heimbach, J. T., and Stokes, R. C., "Nutrition Labeling for Today's Needs," National Technical Information Service, Springfield, VA, Publication No. PB82154402, 1981.

21. The National Heart, Lung, and Blood Institute, "Report of the National Cholesterol Education Program Expert Panel on Detection, Evaluation, and Treatment of High Blood Cholesterol in Adults," *Archives of Internal Medicine*, 148:38-69, 1988.

22. U.S. Department of Agriculture, *Composition of Foods, Raw, Processed, Prepared*, Human Nutrition Information Service, Washington, DC, Agriculture Handbook No. 8-1 to 8-16, 1976-1987.

23. Block, G. et al., "Nutrient Sources in the American Diet: Quantitative Data from the NHANES II Survey," *American Journal of Epidemiology*, 122:27-40, 1985.

24. Thompson, F. E., "Where's the Fat? Where's the Fiber?", Presented at Annual Agricultural Outlook Conference, USDA, Washington, DC, November 30, 1988.

25. Keys, A., and J. T. Anderson and F. Grande, "Serum Cholesterol Response to Changes in the Diet, IV, Particular Saturated Fats in the Diet," *Metabolism*, 14:776-787, 1965.

26. Mattson, F. H., "Effects of Dietary Fats on Plasma HDL and LDL Cholesterol Levels: A Review, Dietary Fats and Health," AOCS Monograph 10, American Oil Chemists' Society, Champaign, IL, pp. 679-680, 1983.

27. Bonanome, A., and Grundy, S. M., "Effect of Dietary Stearic Acid on Plasma Cholesterol and Lipoprotein Levels," *New England Journal of Medicine*, 318:1244-1248, 1988.

28. Life Sciences Research Office, *Health Aspects of Dietary Trans Fatty Acids*, Federation of American Societies for Experimental Biology, Bethesda, MD (under Contract No. FDA 223-83-2020), 1985.

29. Lecos, C. W., "Planning a Diet for a Healthy Heart," *FDA Consumer*, pp. 29-36, March 1987 (also printed as HHS Publication No. (FDA) 87-2220).

30. U.S. Department of Agriculture, "Nutrition and Your Health, Dietary Guidelines for Americans, Avoid too Much Fat, Saturated Fat and Cholesterol," Human Nutrition Information Service, Hyattsville, MD, Home and Garden Bulletin No. 232-3, 1986.

31. "Handy Reference for Grams of Fat Allowed at Thirty Percent Fat Level," *Environmental Nutrition*, Vol. 11, No. 11, p. 3, November 1986.

32. McNutt, K., "Nutritious Science or Does Language Limit Our Nutrition Communications?", *Nutrition Today*, Vol. 23, No. 4, p. 19, August 1988.

33. Sheppard, A. J., "Lipid Manual," Unpublished, 1989. Copies are available from Division of Nutrition (HFF-200), Center for Food Safety and Applied Nutrition, Food and Drug Administration, Washington, DC 20204.

## VIII. Environmental Impact

The agency has previously considered the environmental effects of this rule as announced in the proposed rule November 25, 1986; 51 FR 42584. No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

## IX. Economic Impact

In accordance with Executive Order 12291, FDA has previously analyzed the potential economic effects of this final rule. As announced in the proposal, the agency has determined that the rule is not a major rule as defined by the Order. The agency has not received any new information or comments that would alter its previous determination.

In accordance with the Regulatory Flexibility Act, the agency previously considered the potential effects that this rule would have on small entities, including small businesses. In accordance with section 605(b) of the Regulatory Flexibility Act, the agency has determined that no significant impact on a substantial number of small entities would derive from this action. FDA has not received any new information or comments that would alter its previous determination.

## List of Subjects in 21 CFR Part 101

Food labeling, Incorporation by reference, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 101 be amended as follows:

## PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

2. Section 101.9 is amended by revising paragraphs (c)(6) and (e)(5), by redesignating paragraph (e)(6) as paragraph (e)(7), by adding a new paragraph (e)(6), and by removing the parenthetical statement at the end of the section to read as follows:

### § 101.9 Nutrition labeling of food.

(c) \* \* \*

(6)(i) "Fat content" or "Fat": A statement of the number of grams of fat in a serving (portion) expressed to the

nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative. Fatty acid and cholesterol content may also be declared in compliance with paragraph (c)(6)(ii) of this section.

(ii) When fatty acid or cholesterol content is declared, both shall be declared, in that order, immediately following the statement of fat content except that products that contain 2 grams or less fat in a serving or 10 percent or less fat on a dry weight basis need not include fatty acid content information. These declarations shall comply with the following requirements:

(a) Fatty acids: A statement of the fatty acid content, calculated as triglycerides, in a serving shall be placed on the nutrition label immediately following the statement on fat content. Fatty acid content shall be stated as grams per serving to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative. Fatty acid content shall be stated in the following categories, with the following headings, in the following order, and displayed in equal prominence:

(1) *Cis, cis*-methylene-interrupted polyunsaturated fatty acids, stated as "Polyunsaturated";

(2) *Cis*-monounsaturated fatty acids, stated as "Monounsaturated" (voluntary);

(3) The sum of lauric, myristic, palmitic, and stearic acids, stated as "Saturated".

(b) "Cholesterol": A statement of the cholesterol content in a serving (portion) shall be placed on the nutrition label immediately following the statement on fatty acid content (or the statement of fat content, if fatty acid content is not stated). Cholesterol content shall be stated in milligrams per serving to the nearest 5-milligram increment, except that if the food contains less than 2 milligrams of cholesterol per serving, the content may be stated as 0. If the food contains 2 or more but less than 5 milligrams of cholesterol per serving, the content shall be stated as "less than 5 milligrams."

(iii) Fat, fatty acids, and cholesterol may be determined by following the method contained in the "Official Methods of Analysis of the Association of Official Analytical Chemists" (AOAC), 15th Ed. (1990), which is incorporated by reference in accordance with 5 U.S.C. 552(a), or by other reliable and appropriate methods. Copies of the "Official Methods of Analysis of the

Association of Official Analytical Chemists" are available from the Association of Official Analytical Chemists, 2200 Wilson Blvd., suite 400, Arlington, VA 22201-3301. The incorporation by reference is available for inspection at the Office of the Federal Register, 1100 L St. NW., Washington, DC.

\* \* \* \* \*

(e) \* \* \*

(5) A food with a label declaration of calories, carbohydrates, fat, cholesterol, or sodium shall be deemed to be misbranded under section 403(a) of the Federal Food, Drug, and Cosmetic Act (the act) if the nutrient content of the composite is greater than 20 percent in excess of the value for that nutrient declared on the label, or the fat content is less than required by current good manufacturing practices.

(6) A food with a label declaration of fatty acid content shall be deemed to be misbranded under section 403(a) of the act if the content of the composite is greater than 20 percent in excess of the value, or less than 80 percent of the value for the fatty acid content declared on the label.

\* \* \* \* \*

3. Section 101.25 is revised to read as follows:

### § 101.25 Labeling of foods in relation to fat, fatty acid, and cholesterol content.

(a) Cholesterol content. (1) A food label or labeling may include information on the cholesterol content of the food: *Provided*, That it meets the following conditions:

(i) Nutrition information is provided on the food label in conformity with § 101.9 including a quantitative statement of the cholesterol and, where appropriate, fatty acid content of the food in accordance with § 101.9(c)(6)(ii).

(ii) The food is not intended specifically for use by infants and toddlers less than 2 years of age.

(2) Certain descriptive terms about the quantitative cholesterol content of a food may be used on the label and in labeling provided such statements comply with the following rules:

(i) The terms "free of cholesterol," "cholesterol free," or "no cholesterol" may be used on the label or in labeling of foods that contain less than 2 milligrams of cholesterol per serving, and 5 grams or less total fat per serving and 20 percent or less total fat on a dry weight basis and 2 grams or less saturated fatty acids per serving and 6 percent or less saturated fatty acids on a dry weight basis. If a food meets these conditions and inherently contains less than 2 milligrams of cholesterol per

serving without the benefit of special processing or reformulation to alter cholesterol content, it shall be labeled as a "cholesterol free food" provided that such labeling clearly refers to all foods of that type and not merely to the particular brand to which the labeling attaches, e.g., "applesauce, a cholesterol free food." It shall not be labeled with the term "cholesterol free" immediately preceding the name of the food (e.g., "cholesterol free applesauce") because such terminology would imply that the food has been altered to reduce cholesterol as compared to other foods of the same type.

(ii) The terms "low in cholesterol" or "low cholesterol" may be used on the label or in labeling of foods that contain 20 milligrams or less of cholesterol per serving and 0.2 milligram or less cholesterol per gram of food, and 5 grams or less total fat per serving and 20 percent or less total fat on a dry weight basis and 2 grams or less saturated fatty acids per serving and 6 percent or less saturated fatty acids on a dry weight basis. If a food meeting these conditions inherently contains 20 milligrams or less cholesterol per serving and 0.2 milligram or less cholesterol per gram without the benefit of special processing or reformulation to alter cholesterol content, it shall be labeled as a "low cholesterol food" provided that such labeling clearly refers to all foods of that type and not merely to the particular brand to which the labeling attaches, e.g., "lowfat cottage cheese, a low cholesterol food." It shall not be labeled

with the term "low cholesterol" immediately preceding the name of the food (e.g., "low cholesterol lowfat cottage cheese") because such terminology would imply that the food has been altered to reduce cholesterol as compared to other foods of the same type.

(iii) The terms "cholesterol reduced" or "reduced cholesterol" may be used on the label or in labeling of a food that has been specifically formulated or processed to reduce its cholesterol content by 75 percent or more from the food it resembles in organoleptic properties and for which it substitutes, provided that the label of such a food also bears clear and concise quantitative information comparing the product's per serving cholesterol content with that of the food it replaces (e.g., "cholesterol content has been reduced from 100 milligrams to 25 milligrams per serving").

(iv) A food that has been formulated or processed to reduce its cholesterol content by 25 percent or more from the food it resembles in organoleptic properties and for which it substitutes may bear comparative cholesterol information on its label or labeling, provided that the label of such a food also bears clear and concise quantitative information on the extent that the cholesterol was reduced, comparing the product's per serving cholesterol content with that of the food it replaces (e.g., "this pound cake contains 35 percent less cholesterol than our regular pound cake (cholesterol

lowered from 70 milligrams to 45 milligrams per serving)").

(b) *Fatty acid content.* A food label or labeling may include information on the fatty acid content of the food *Provided*, That it meets the following conditions:

(1) Nutrition information is provided on the food label in conformity with § 101.9 including a quantitative statement of the cholesterol and fatty acid content in accordance with § 101.9(c)(6)(ii).

(2) The food is not intended specifically for use by infants and toddlers less than 2 years of age.

(c) A food label or labeling may include other descriptive terms that further characterize the cholesterol or fatty acid content of the food (e.g., "contains 100 percent vegetable oil" or "no animal fat") provided that the label bears nutrition labeling that includes quantitative information on total fat, fatty acid, and cholesterol content in conformity with § 101.9.

(d) Any label or labeling containing any statement concerning fat, fatty acids, or cholesterol that is not in conformity with this section shall be deemed to be misbranded under sections 201(n) and 403(a) of the Federal Food, Drug, and Cosmetic Act.

Dated: June 5, 1990.

James S. Benson,

Acting Commissioner of Food and Drugs.

Louis W. Sullivan,

Secretary of Health and Human Services.

[FR Doc. 90-16726 Filed 7-13-90; 3:14 pm]

BILLING CODE 4160-01-M



# Federal Register

Thursday  
July 19, 1990

---

## Part III

### Department of Health and Human Services

---

#### Food and Drug Administration

---

**21 CFR Parts 101, 104 and 105**  
**Food Labeling; Reference Daily Intakes**  
**and Daily Reference Values; Mandatory**  
**Status of Nutrition Labeling and Nutrient**  
**Content Revision; Serving Sizes;**  
**Proposed Rules**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**
**Food and Drug Administration**
**21 CFR Parts 101 and 104**
**[Docket No. 90N-0134]**
**RIN 0905-AD03**
**Food Labeling; Reference Daily Intakes and Daily Reference Values**
**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to establish two sets of reference values—Reference Daily Intakes (RDI's) and Daily Reference Values (DRV's)—for use in declaring nutrient content in nutrition labeling. The use of reference values as part of nutrition labeling serves to assist consumers in interpreting information about the amount of a nutrient present in a food and in comparing the nutritional values of food products.

The agency is proposing: (1) To replace the current U.S. Recommended Daily Allowances (U.S. RDA's) with the RDI's; (2) to establish RDI's for protein and for 26 vitamins and minerals; (3) to establish RDI's for five groups: adults and children 4 or more years of age, children less than 4 years of age, infants, pregnant women, and lactating women; and (4) to establish DRV's for adults and children 4 or more years of age for eight food components considered important to the maintenance of good health: fat, saturated fatty acids, unsaturated fatty acids, cholesterol, carbohydrate, fiber, sodium, and potassium.

FDA intends to use these two sets of reference values—RDI's and DRV's—as a single list of reference values known as the "Daily Values" for use in presenting nutrition information on the food label. A companion document published elsewhere in this issue of the *Federal Register* addresses, among other issues, the nomenclature that the agency is proposing for use in the nutrition label.

**DATES:** Written comments by November 16, 1990. The agency is proposing that any final rule that it may issue based upon this proposal become effective 1 year following publication of any final rule based upon this proposal.

**ADDRESSES:** Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Room 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Christine Lewis, Center for Food Safety and Applied Nutrition (HFF-265), Food

and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-485-0088.

**SUPPLEMENTARY INFORMATION:**
**Introduction**

In the *Federal Register* of August 8, 1989 (54 FR 32610), FDA published an advance notice of proposed rulemaking (ANPRM) that solicited public comment on a wide range of food labeling issues to help the agency determine what, if any, changes in food labeling requirements should be proposed. On March 7, 1989, Louis W. Sullivan, Secretary of the U.S. Department of Health and Human Services, announced plans for a comprehensive food labeling initiative to be undertaken by the Food and Drug Administration. This document, and others published elsewhere in this issue of the *Federal Register*, are a part of that initiative. More specifically, this document and another addressing serving sizes are technical supporting documents to the document entitled "Food Labeling: Mandatory Status of Nutrition Labeling and Nutrient Content Revision."

FDA is proposing in this document to establish reference values (RDI's and DRV's) for use on food labels to inform consumers about the nutrient content of foods. The agency is proposing the RDI's to provide a basis for consumers to compare the protein, vitamin, and mineral content of foods. It is proposing the DRV's to provide a similar basis for comparison of certain other food components (fat, fatty acids, cholesterol, carbohydrate, fiber, sodium, and potassium) that have been identified as important to diet and health interrelationships. If the amounts of nutrients present in a serving of a food are listed on the food label as percentages of the reference values, consumers will be able to judge the usefulness of a food in meeting overall daily nutrient requirements or recommended consumption levels and to compare the nutrient contributions of different foods.

Thus, FDA is proposing to establish these two sets of proposed reference values under sections 201(n), 403(a), and 701(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(n), 343(a), and 371(a)) (the act). These values will assure that nutrition labeling is not misleading for lack of completeness. They provide a basis on which to judge the nutritional value of a food and its overall contribution to the daily diet.

The ANPRM on food labeling addressed the U.S. RDA's only as an element in nutrition labeling and did not request public comments on the particular reference values. Therefore, the agency specifically requests

comments on the consumer usefulness of this proposal and recommendations for alternatives.

**A. Regulatory History**

In the *Federal Register* of March 30, 1972 (37 FR 6493), FDA proposed to establish a new section on nutrition labeling (21 CFR 1.16) (redesignated in the final rule as 21 CFR 1.17 and recodified as 21 CFR 101.9 in the *Federal Register* of March 15, 1977 (42 FR 14302)) that included a set of values, to be known as "Recommended Daily Allowances," for vitamins and minerals. These values were based on the 7th edition (1968) of the "Recommended Dietary Allowances" issued by the National Research Council of the National Academy of Sciences (NAS/NRC) (Ref. 1). The RDA values were established for several age and sex groups and reflected levels of intake judged to be adequate to meet the known nutrient needs of practically all healthy persons. All who commented recognized the need for a single set of standard nutrient requirements applicable to nutrition labeling and other regulations with nutrition components. These comments therefore supported the use of a single set of values derived from the NAS/NRC values. This single set of values could not be considered reflective of nutrient needs for individuals, but the values were considered useful for comparing the relative contributions of various foods to the overall diet.

After considering the comments and other available information, FDA issued a final rule in the *Federal Register* of January 19, 1973 (38 FR 2125), establishing nutrition labeling regulations that included in 21 CFR 1.17(c)(7)(iv) (recodified as 21 CFR 101.9(c)(7)(iv), in the *Federal Register* of March 15, 1977 (42 FR 14302)) a single set of values, to be known as "U.S. Recommended Daily Allowances (U.S. RDA's)." These values were for 12 vitamins (vitamin A, vitamin C, thiamine, riboflavin, niacin, vitamin D, vitamin E, vitamin B<sub>6</sub>, folic acid, vitamin B<sub>12</sub>, biotin, and pantothenic acid) and 7 minerals (calcium, iron, phosphorus, iodine, magnesium, zinc, and copper). All but four of these values were based on NAS/NRC's 1968 recommended dietary allowance (RDA) values for various age and sex groups. However, even though NAS/NRC had not set RDA values for biotin, pantothenic acid, copper, and zinc, FDA developed U.S. RDA values for these four nutrients. The agency based these values on the text of "Recommended Dietary Allowances," 7th edition (Ref. 1).

The purpose of the designation "U.S. RDA" was to distinguish the set of values that FDA had included in its regulations from any single set of NAS/NRC RDA values. The U.S. RDA values were derived from the highest RDA value for each nutrient given in the NAS/NRC table for males and nonpregnant, nonlactating females 4 or more years of age, except for calcium and phosphorus. FDA generally selected the highest values to assist all segments of the population, and because the differences between the highest values and some specific set of values for an age or sex group, or a set median or mean values, were generally minor. The agency did not set the U.S. RDA values for calcium and phosphorus at the highest RDA values because of the physical bulk and solubility of these nutrients, the wide variability in RDA's for calcium among different age and sex groups, and the lower calcium values generally advocated by international groups such as the Food and Agriculture

Organization and the World Health Organization Expert Group on Calcium Requirements (38 FR 2125 at 2126 and 2127). The agency selected a value that approximated the midpoint of the RDA values for males and females.

In the January 1973 final rule, FDA also addressed differences in protein quality (38 FR 2125 at 2128) by establishing 21 CFR 1.17(c)(7)(ii)(a) (recodified as 21 CFR 101.9(c)(7)(ii)(a) in the Federal Register of March 15, 1977 (42 FR 14302)). In this regulation, the agency established a U.S. RDA for protein for adults and children over 4 years of age of 45 grams if the Protein Efficiency Ratio (PER) of the total protein in a product equals or is greater than that of casein, and of 85 grams if the PER is less than that of casein.

In the Federal Register of June 14, 1974 (39 FR 20878), FDA established in 21 CFR 1.17(h)(1) (recodified as 21 CFR 101.9(h)(1) in the Federal Register of March 15, 1977 (42 FR 14302)), a U.S. RDA for protein for (1) infants at 18

grams of protein with a PER equal to or greater than casein and at 25 grams if the PER of the protein is less than the PER of casein but greater than 40 percent of casein, and (2) children under 4 years of age at 20 grams of protein with a PER equal to or greater than casein and at 28 grams if the PER of the protein is less than the PER of casein but greater than 20 percent of casein. FDA also established the minimum protein quality required to make a U.S. RDA label declaration and defined when the U.S. RDA's for children under 4 years of age can be used in labeling.

FDA attempted to establish single sets of U.S. RDA values for foods for special dietary use under section 403(j) of the act in 21 CFR 125.1 (recodified as 21 CFR 105.3 in the Federal Register of March 15, 1977 (42 FR 14302)) for (1) infants, (2) children under 4 years of age, (3) adults and children 4 or more years of age, and (4) pregnant and lactating women (38 FR 20708; August 2, 1973). The four sets of U.S. RDA's were established as follows:

Vitamins and minerals	Unit of measurement	Infants	Children under 4 years of age	Adults and children 4 or more years of age	Pregnant or lactating women
Vitamin A	International units	1,500	2,500	5,000	8,000
Vitamin D	do	400	400	400	400
Vitamin E	do	5	10	30	30
Vitamin C	Milligrams	35	40	60	60
Folic acid	do	.1	.2	.4	.8
Thiamine	do	.5	.7	1.5	1.7
Riboflavin	do	.6	.8	1.7	2
Niacin	do	8	9	20	20
Vitamin B <sub>6</sub>	do	.4	.7	2	2.5
Vitamin B <sub>12</sub>	Micrograms	2	3	6	8
Biotin	Milligrams	.05	.15	.30	.30
Pantothenic acid	do	3	5	10	10
Calcium	Grams	.6	.8	1	1
Phosphorus	do	.6	.8	1	1
Iodine	Micrograms	45	70	150	150
Iron	Milligrams	15	10	18	18
Magnesium	do	70	200	400	450
Copper	do	.6	1	2	2
Zinc	do	5	8	15	15

FDA's justification for the establishment of four sets of U.S. RDA's was the demonstrable distinctions among the nutritional requirements of infants, children under 4 years of age, pregnant or lactating women, and adults and children 4 or more years of age.

These regulations never became effective. They were challenged and vacated on procedural and other grounds not relevant to this rulemaking in *National Nutritional Foods Association v. FDA*, 504 F.2d 761 (2d Cir. 1974), cert. denied, 420 U.S. 946 (1975) and in *National Nutritional Foods Association v. Kennedy*, 572 F.2d 377 (2d Cir. 1978).

Although the foods for special dietary use regulation never became effective,

the U.S. RDA's for infants, for children under 4 years of age, and for pregnant or lactating women gained acceptance, and manufacturers have continued to voluntarily provide this information on foods (other than infant formulas) that are promoted for use solely by these specific subgroups.

#### *B. Need for Change in Reference Values for Nutrition Labeling*

FDA has not revised the U.S. RDA values since it first promulgated them. NAS/NRC updated the RDA's in 1974 and 1980, but FDA did not revise the U.S. RDA's at either time because the agency did not believe that the changes that NAS/NRC made were significant enough to warrant a revision. However,

in recent years, there have been significant advances in scientific knowledge with respect to essential nutrient requirements. In 1989, NAS/NRC updated the RDA's (Ref. 2) to include for the first time RDA values for vitamin K and selenium and to make significant revisions in the allowances for several nutrients, including vitamin B<sub>6</sub>, folate, vitamin B<sub>12</sub>, magnesium, iron, and zinc.

In addition, scientific advances permitted NAS/NRC (Ref. 2) to substantively revise values for the listing known as "Estimated Safe and Adequate Daily Dietary Intakes" (ESADDI's). NAS/NRC establishes ESADDI's for essential nutrients for which the research and clinical data are

sufficient to allow it to estimate requirements, but for which data are not sufficient to develop RDA values. The ESADDI's are issued by NAS/NRC in the RDA report but are presented in a table separate from the RDA table. The 1989 ESADDI's include revised values for three nutrients—biotin, pantothenic acid, and copper—for which FDA established U.S. RDA's in 1973. The 1989 ESADDI's also include manganese, fluoride, chromium, and molybdenum.

Moreover, during the last 10 years, there has been a shift in public health concerns away from nutritional deficiencies and toward more emphasis on the relationship between diet and health. The decreased emphasis on nutritional deficiencies has occurred, in part, because the incidence of nutritional deficiencies, such as pellagra, has become very low as a result of increased availability of food, food enrichment practices, and nutrition education efforts. The interest in the relationship between diet and health reflects the growing consensus among the scientific community that such a relationship exists.

Numerous dietary guidelines and reviews relating to diet and health, particularly to the effect of diet on the risk of developing certain chronic diseases, have been published within the last decade. These documents include the 1982 National Academy of Sciences' Diet, Nutrition, and Cancer (Ref. 3); the 1980 and 1985 U.S. Department of Agriculture/ Department of Health and Human Services' "Dietary Guidelines for Americans" (Refs. 4 and 5); the 1989 National Academy of Sciences' Diet and Health (Ref. 6); the 1988 Surgeon General's Report on Nutrition and Health (Ref. 7); the National Cancer Institute's dietary guidelines (Ref. 8); the 1990 report from the National Cholesterol Education Program on population strategies for blood cholesterol reduction (Ref. 9); and a 1987 report entitled Physiological Effects and Health Consequences of Dietary Fiber from the Life Sciences Research Office of the Federation of American Societies for Experimental Biology (Ref. 10). These recommendations and guidelines assert that while Americans can continue enjoying the generally excellent nutritional quality of their diets, they should moderate their food habits to conform better with dietary patterns that are associated with good health and a decreased risk of certain chronic diseases.

The recommendations and guidelines place their emphasis on the total diet, not on individual foods. There is a

general consensus among them that nutritional and health goals should be achieved through changes in food consumption patterns rather than through fortification and supplementation practices. In consideration of this emphasis, the agency has decided that as part of its efforts to respond to the changing nutrition information needs of consumers, a revision of nutrition labeling, including an updating of the U.S. RDA's, is needed.

#### *C. FDA's Response to the Need for Change*

In response to the need to revise the U.S. RDA's and to address current concerns about information on food components important to diet and health interrelationships, FDA is proposing to update and to expand the reference values for nutrition labeling of foods. As discussed below, however, the reference values can only be set for nutrients and food components for which there are sufficient data and scientific consensus to establish quantitative values.

##### **1. U.S. RDA Revision and Redesignation of the Term "U.S. RDA" as "RDI"**

FDA is proposing to revise the U.S. RDA's based primarily on NAS/NRC's 1989 update of the RDA's and ESADDI's (except for chloride) and to redesignate "U.S. RDA's" as "RDI's". As stated previously, the term "U.S. RDA" was chosen to distinguish the reference values that it represented from the "RDA's" established by NAS/NRC. These terms have been confused, however, through the years. FDA receives many questions from consumers about the differences between these values. To alleviate this confusion, FDA believes that a change in terminology is necessary.

Additionally, FDA is proposing to change the approach used to determine the RDA-based value that will serve as the RDI. For each nutrient, NAS/NRC has established an RDA value for each of 18 groups. It has established values for children (in years) 4 to 6 and 7 to 10, for males (in years) 11 to 14, 15 to 18, 19 to 24, 25 to 50, and 51+, and for females (in years) 11 to 14, 15 to 18, 19 to 24, 25 to 50, and 51+. NAS/NRC has also established RDA values for infants 0.0 to 0.5 and 0.5 to 1.0 year of age as well as for children 1 to 3 years of age, for pregnant women, and for lactating women during the first 6 months of lactation and during the second 6 months of lactation. NAS/NRC has also established ESADDI values for adults, for children (in years) 1 to 3, 4 to 6, 7 to 10, and 11+, and for infants 0.0 to 0.5 and 0.5 to 1.0 year of age.

In the past, the agency generally selected the highest of the age/sex RDA values for a particular nutrient as the single reference value that would serve as the U.S. RDA for that nutrient. However, because the purpose of the RDI is to serve as a general food labeling reference value, and not to represent dietary allowances for individuals, the agency is now proposing to calculate the RDI's by using a population-adjusted mean of the relevant NAS/NRC RDA's and ESADDI's.

The advantage of changing to an adjusted mean of the RDA's as the reference value for RDI's is that the mean is a population-based value that is mathematically derived. Therefore, it will serve the purpose of providing an overall reference value for food labeling more appropriately than a highest value. Furthermore, because of the decreasing public health concern with nutritional deficiencies, it makes less sense to use maximum values as the basis for these reference values.

FDA is proposing to establish five sets of RDI's for nutrition labeling, specifically, for adults and children 4 or more years of age (excluding pregnant or lactating women), for children less than 4 years of age (13 through 47 months), for infants (0 through 12 months), for pregnant women, and for lactating women. FDA is proposing RDI's for these groups so that reference values that are applicable to the intended groups will exist for use in the nutrition labeling of foods that are specially formulated for infants or for children under 4 years of age as well as for pregnant women or lactating women. Because children 4 or more years of age and adults generally eat the same foods, the agency historically has grouped them together to establish one set of reference values. Having one set of RDI's for this large group simplifies nutrition labeling by allowing for one column of nutrients on most foods.

The RDI's for infants should not be confused with the nutrient requirements for infant formula (21 CFR part 107) which were developed by the American Academy of Pediatrics, adopted by Congress under section 412(i) of the act (21 U.S.C. 350a(i)) and amended by regulation under section 412(i)(2) of the act. The nutrient requirements in section 412(i) of the act represent minimum requirements for formulas which are the sole source of nutrients for normal, full term infants. In contrast, the RDI's for infants are based on the NAS/NRC RDA's and have been developed to provide a basis on which to judge the nutritional value of infant foods, other

than infant formula, not to establish minimum requirements.

## 2. Establishment of DRV's for Nutrition Labeling

There are several nutrients and food components, such as fat and fiber, for which RDA's or ESADDI's have not been established but that are important in diet and health interrelationships. Consumers are becoming more aware of the role of these nutrients and food components in diet-health interrelationships and have expressed growing interest in the inclusion of information about those substances on food labels to help them determine how individual foods fit within general recommendations for their total daily diet. The agency believes that reference values for these food components will be useful to consumers in making these types of determinations, and that establishing such values will help to assure uniformity in the presentation of nutrition information on food labels.

FDA proposes to designate the reference values for these types of nutrients and food components as "DRV's." The agency is proposing DRV's for the category of persons 4 or more years of age. The DRV's are intended for the general population and FDA has traditionally used the age category of 4 or more years as representative of the general population for nutrition labeling purposes. Therefore, the selection of the age category 4 or more years is for regulatory purposes only and is not intended to encompass or overshadow recommended intakes which may be developed by other groups or agencies for use with specific, targeted populations. The food components for which FDA is proposing to establish DRV's are fat, saturated fatty acids, unsaturated fatty acids, cholesterol, carbohydrate, fiber, sodium, and potassium. A more complete scientific rationale for the selection of these eight food components is set forth in the proposal on "Mandatory Status of Nutrition Labeling and Nutrient Content Revision," published elsewhere in this issue of the Federal Register.

The distinction between the RDI's and the DRV's is necessary for several reasons. First, the RDI's reflect average allowances for all persons and are based on the RDA's, which are considered intake levels to be achieved. However, while some DRV's are based on recommendations to increase or maintain intake of the particular food component, other DRV's reflect levels that are limitations on intake. Furthermore, many of the DRV's must be based on a specific caloric intake, and, unlike the RDI's, the DRV's are not

relevant for infants and young children. Finally, the RDI's, as successors to the U.S. RDA's, will serve as criteria for use in several regulatory functions, such as the application of the agency's food fortification policy and the assessment of the nutritional equivalency of imitation foods. The DRV's, if adopted, will not have such uses. It is, therefore, necessary that, for most purposes, these two sets of reference values remain separate. However, in the proposal "Mandatory Status of Nutrition Labeling and Nutrient Content Revision," published elsewhere in this issue of the Federal Register, FDA is proposing that both RDI's and DRV's be designated as "Daily Values" on the nutrition label. FDA believes that doing so will limit consumer confusion. In virtually all other circumstances, FDA believes that it is appropriate to treat RDI's and DRV's as two different sets of reference values.

## II. Comments

The advanced notice of proposed rulemaking on food labeling (54 FR 32610; August 8, 1989) addressed the U.S. RDA's only as an element in nutrition labeling and did not request public comments on these reference values. Therefore, few comments on the U.S. RDA's were received. However, several comments from health professionals, primarily dietitians, stated that the U.S. RDA's should be updated to reflect the 10th edition (1989) of the Recommended Dietary Allowances issued by NAS/NRC. Two comments stated that FDA should schedule periodic updates of the U.S. RDA's to reflect nutrition reports from the Surgeon General and the National Institutes of Health, as well as to reflect revisions in the RDA values and in the U.S. Department of Agriculture/Department of Health and Human Services' "Dietary Guidelines for Americans."

FDA concurs with these comments. This proposal is based in part on the 10th edition (1989) of "Recommended Dietary Allowances" issued by NAS/NRC. As to periodic updates, FDA intends to update the RDI's and DRV's if and when it considers an update warranted because of changes in the RDA's or other values or because of major new findings.

## III. Development of Values for RDI'S and DRV'S

In developing the RDI's and DRV's, FDA reviewed a range of reports, as discussed above. The agency has relied, however, primarily on three sources of data in establishing these values. These sources are: "Recommended Dietary

Allowances," 10th edition, NAS/NRC (Ref. 2); "Diet and Health," National Academy of Sciences (Ref. 6); and the "Surgeon General's Report on Nutrition and Health," U.S. Department of Health and Human Services (Ref. 7). These sources are based on findings from the scientific literature and are widely recognized and accepted. They also provide quantitative values that can be used in determining specific levels of dietary intake.

## A. RDI's

### 1. RDI's for Nutrients with RDA's

a. *Source information.* The nutrients for which NAS/NRC has established RDA's are protein, vitamin A, vitamin D, vitamin E, vitamin K, vitamin C, thiamin, riboflavin, niacin, vitamin B<sub>6</sub>, folate, vitamin B<sub>12</sub>, calcium, phosphorus, magnesium, iron, zinc, iodine, and selenium. For each of these nutrients, NAS/NRC has established RDA values for 18 age and sex categories, including pregnant women and lactating women.

For the purposes of food labeling, however, FDA considers the use of a single reference value to be more practical. To obtain a single value, FDA is proposing to derive RDI's by calculating a population-adjusted mean of the RDA's for the NAS/NRC age and sex groups relevant to the labeled nutrient. While population estimates will change over time, the mean values calculated using current U.S. Census data should remain relevant for the next decade. As newer population data become available, such data will be reviewed by the agency to determine if there is a need to revise these reference values.

b. *Calculation procedures.* FDA calculated the proposed RDI's for persons 4 or more years of age using the 1989 RDA values for the following NAS/NRC age/sex categories (in years): children 4 to 6 and 7 to 10; males 11 to 14, 15 to 18, 19 to 24, 25 to 50, and 51+; and females 11 to 14, 15 to 18, 19 to 24, 25 to 50, and 51+. FDA calculated the proposed RDI's for infants by using the RDA values for infants 0 to 0.5 and 0.5 to 1 year. However, for persons 1 to 3 years of age, the NAS/NRC RDA report provides a single RDA value for each nutrient. Thus, the proposed RDI's for children under 4 years of age did not require special calculations, and FDA is directly incorporating the RDA values as the proposed RDI values for this subpopulation. Likewise, the NAS/NRC report provides a single RDA value for each nutrient for pregnant women and, thus, FDA is directly incorporating the RDA values as the proposed RDI values

for this group. The NAS/NRC report provides RDA values for women lactating during the first 6 months of lactation and RDA values for the second 6 months of lactation. Reliable census data are not available to allow for an adjusted mean for these two groups of lactating persons. However, there is evidence that the majority of American women do not breast feed their infants beyond 6 months (Ref. 11). Therefore,

FDA considers the RDA values for the first 6 months of lactation to be the most appropriate value for the RDI and has selected the RDA values for the first 6 months of lactation to serve as the RDI's for the subpopulation of lactating women.

To obtain single population-based reference values for infants and for persons 4 or more years of age, FDA calculated the population-adjusted mean

of the appropriate age groupings of RDA values by using the current estimates of national population size (Ref. 12) for each NAS/NRC age or age/sex category. For each age or age/sex category within an RDI age group, FDA multiplied the RDA value for each nutrient by the population size for the category (Ref. 13). For example, for zinc for person 4 or more years of age:

Age/sex category	Zinc RDA	Population size
4 to 6 years	10 milligrams	11,095,000 = 110,950,000 milligrams.
7 to 10 years	10 milligrams	13,936,000 = 139,360,000 milligrams.
11 to 14 years, males	15 milligrams	6,712,000 = 100,680,000 milligrams.
15 to 18 years, males	15 milligrams	7,575,000 = 113,625,000 milligrams.
19 to 24 years, males	15 milligrams	12,222,000 = 183,330,000 milligrams.
25 to 50 years, males	15 milligrams	47,752,000 = 716,280,000 milligrams.
51+ years, males	15 milligrams	27,068,000 = 406,020,000 milligrams.
11 to 14 years, females	12 milligrams	8,403,000 = 100,836,000 milligrams.
15 to 18 years, females	12 milligrams	7,241,000 = 86,892,000 milligrams.
19 to 24 years, females	12 milligrams	11,721,000 = 140,652,000 milligrams.
25 to 50 years, females	12 milligrams	46,754,000 = 561,048,000 milligrams.
51+ years, females	12 milligrams	33,894,000 = 406,728,000 milligrams.
Total		232,373,000 3,042,401,000 milligrams.

For each nutrient, the values obtained by multiplying the age/sex category population size by the RDA value were summed for persons 4 or more years of age (excluding pregnant and lactating women) and for infants 0.0 to 1.0 years. FDA divided the summed values by the respective total population size for each of these two RDI age groups in order to derive a single RDI for each nutrient for each age group (Ref. 13). Final values were rounded (Ref. 13). In the example above for zinc for persons 4 or more years of age, the summed value of 3,042,401,000 was divided by the total population size for persons 4 or more years of age (i.e., 232,373,000). The resulting value 13.092727 milligrams, is the population-adjusted mean of the RDA values for zinc. This value was rounded to 13 milligrams.

The population estimates used include numbers of persons in the armed forces

overseas as well as the U.S. Bureau of Census adjustment for the net census undercount. However, the Bureau of Census does not report population sizes for persons less than 1 year of age. Therefore, population sizes for the infant age categories required special calculations using data from the National Center for Health Statistics, Centers for Disease Control (Refs. 14 and 15). Specifically, FDA used the number of live births per month for the period of time July 1, 1986 to July 1, 1987 to estimate the proportion of infants likely to be less than 6 months of age and the proportion likely to be more than 6 months of age on July 1, 1987. These proportions were 0.49 and 0.51, respectively (Ref. 13). Thus the single Census population size for infants 0 to 1 year of age (i.e., 3,765,000) was adjusted to indicate 1,844,850 infants 0.0 to 0.5 year of age and 1,920,150 infants 0.5 to

1.0 year of age. FDA does not consider this estimate to be precise because it does not take into account deaths during this time period, but it nonetheless serves as a reasonably reliable adjustment factor for the available data from the Bureau of Census.

c. *Calculated values.* FDA is proposing RDI's in § 101.9(c)(7)(iii) for protein for infants (14 grams), for children less than 4 years of age (16 grams), for persons 4 or more years of age (50 grams), for pregnant women (60 grams), and for lactating women (65 grams). A discussion of methodologies for determining protein quality (PER) is included in the companion document on nutrition labeling, published elsewhere in this issue of the Federal Register. FDA is also proposing RDI's in § 101.9(c)(10)(iv) for the remaining nutrients with 1989 RDA's. They are set out in the following table:

Nutrient	Unit of measurement	Adults and children 4 or more years of age	Children less than 4 years of age <sup>1</sup>	Infants <sup>2</sup>	Pregnant women	Lactating women
Vitamin A	Retinol equivalents <sup>3</sup>	875	400	375	800	1300
Vitamin C	Milligrams	60	40	33	70	95
Calcium	do	900	800	500	1200	1200
Iron	do	12	10	8.0	30	15
Vitamin D	Micrograms <sup>4</sup>	6.5	10	9.0	10	10
Vitamin E	alpha-Tocopherol equivalents <sup>5</sup>	9.0	6.0	3.5	10	12
Vitamin K	Micrograms	65	15	7.5	65	65
Thiamin	Milligrams	1.2	0.7	0.4	1.5	1.6
Riboflavin	do	1.4	0.8	0.5	1.6	1.8
Niacin	Niacin equivalents <sup>6</sup>	16	9.0	5.5	17	20
Vitamin B <sub>6</sub>	Milligrams	1.5	1.0	0.5	2.2	2.1

Nutrient	Unit of measurement	Adults and children 4 or more years of age	Children less than 4 years of age <sup>1</sup>	Infants <sup>2</sup>	Pregnant women	Lactating women
Folate	Micrograms	180	50	30	400	280
Vitamin B <sub>12</sub>	do	2.0	0.7	0.4	2.2	2.6
Phosphorus	Milligrams	900	800	400	1200	1200
Magnesium	do	300	80	50	320	355
Zinc	do	13	10	5.0	15	19
Iodine	Micrograms	150	70	45	175	200
Selenium	do	55	20	13	65	75

<sup>1</sup> The term "children less than 4 years of age" means persons 13 through 47 months of age.

<sup>2</sup> The term "infants" means persons not more than 12 months of age.

<sup>3</sup> 1 retinol equivalent = 1 microgram retinol or 6 micrograms *beta*-carotene; 1 *alpha*-tocopherol equivalent = 1 milligram *d*-*alpha*-tocopherol (*RRR*-*alpha*-tocopherol); 1 niacin equivalent = 1 milligram niacin or 60 milligrams of dietary tryptophan.

<sup>4</sup> As cholecalciferol.

## 2. RDI's for Nutrients With ESADDI's

a. *Source information.* The nutrients with current ESADDI's are biotin, pantothenic acid, copper, manganese, fluoride, chromium, and molybdenum. While the available data concerning human requirements are sufficient to allow NAS/NRC to estimate requirements for these nutrients, the data are not sufficient to allow NAS/NRC to set specific RDA values (Ref. 2). However, because the reference values the agency is proposing are not intended to reflect precise values for certain age and sex groups but rather to function as an overall population reference, the agency believes that the ESADDI's are an appropriate basis for deriving RDI's and has used these values in establishing RDI's.

b. *Calculation procedures.* In its 1989 report, NAS/NRC established ESADDI's for each of the seven nutrients listed above for seven age groups. To obtain single reference values for infants, for children less than 4 years of age, and for persons 4 or more years of age, FDA calculated RDI's from the ESADDI values in the same manner that it did for nutrients with RDA's (Ref. 13). The agency calculated a population-adjusted mean of the ESADDI values for the NAS/NRC age groups relevant to the labeled nutrient.

The ESADDI's are presented as either single values or as a range of values, depending on the nutrient and age group. FDA based the proposed RDI's for persons 4 or more years of age on the ESADDI value or the midpoint of the

ESADDI range—whichever is provided by the 1989 NAS/NRC RDA report—for the following NAS/NRC age categories: children and adolescents (in years) 4 to 6, 7 to 10, and 11+; and adults.

However, the ESADDI table does not specify the exact age that separates adolescence (11+ years of age) from adulthood. Therefore, for the purposes of establishing these reference values, FDA defined these two open-ended age categories as persons 11 to 18 years and persons 19+ years of age. This division is supported by the NAS/NRC table for RDA's, which contains the age categories 15 to 18 years and 19 to 25 years.

The following example for biotin for persons 4 or more years of age illustrates the calculation procedure:

Age/sex category	Biotin ESADDI	Population Size
4 to 6 years	25 micrograms	11,095,000
7 to 10 years	30 micrograms	13,936,000
11 to 18 years	65 micrograms	27,931,000
19+ years	65 micrograms	179,411,000
Total		232,373,000

The summed value of 14,172,685,000 is divided by the total population size (i.e., 232,373,000) to provide a population-adjusted mean of 60.991100 micrograms which is then rounded to 60 micrograms.

The proposed RDI's for children less than 4 years were derived using the ESADDI or the midpoint of the ESADDI range for children 1 to 3 years of age. FDA calculated the RDI's for infants by using the ESADDI or the midpoint of the

ESADDI range for infants 0 to 0.5 and 0.5 to 1.0 years.

The NAS/NRC report specifies ESADDI values for adults but does not provide values for pregnant or lactating women. There is currently very limited information on whether differences exist between adult requirements for the seven nutrients with ESADDI and the requirements for these nutrients during periods of pregnancy and lactation. However, for purposes of nutrition

labeling, FDA believes that it can use the ESADDI values for adults to derive RDI values for pregnant and lactating women. Therefore, the agency has used the midpoint of the ESADDI range (Ref. 13) for adults as the basis for the RDI for pregnant and lactating women.

c. *Calculated values.* FDA is proposing RDI's in § 101.9(c)(10)(iv) for the seven nutrients with ESADDI values. The proposed RDI are set out in the following table:

Nutrient	Unit of measurement	Adults and children 4 or more years of age	Children less than 4 years of age <sup>1</sup>	Infants <sup>2</sup>
Biotin	Micrograms	60	20	13
Pantothenic acid	Milligrams	5.5	3.0	2.5
Copper	do	2.0	0.9	0.6

Nutrient	Unit of measurement	Adults and children 4 or more years of age <sup>1</sup>	Children less than 4 years of age <sup>1</sup>	Infants <sup>2</sup>
Manganese.....	do.....	3.5	1.3	0.6
Fluoride.....	do.....	2.5	1.0	0.5
Chromium.....	Micrograms.....	120	50	33
Molybdenum.....	do.....	150	38	26

<sup>1</sup> The term "children less than 4 years of age" means persons 13 through 47 months of age.

<sup>2</sup> The term "infants" means persons not more than 12 months of age.

### 3. Usage of RDI's for Selenium, Fluoride, and Chromium

FDA is proposing RDI's for selenium, fluoride, and chromium because the NAS/NRC has established either RDA or ESADDI levels for these nutrients. However, no source of supplementation of any of these three nutrients (e.g., sodium fluoride, selenium sulfide, chromium oxide) is generally recognized as safe (GRAS) or approved as a food additive for use in human food. Therefore, FDA is proposing that these reference values be used only in conjunction with a declaration of the levels of selenium, fluoride, and chromium that are naturally present in a food or, in the case of fluoride, that result from the use of a fluoridated water supply in the processing operation, in accordance with 21 CFR 250.203. FDA's proposal to establish RDI values for selenium, fluoride, and chromium should not be interpreted as a recommendation for use of these three substances for either direct supplementation or adding nutrients to foods.

### 4. RDI's for Chloride

In the 10th edition (1989) of "Recommended Dietary Allowances" (Ref. 2), NAS/NRC provided a minimum requirement for chloride but did not determine an RDA or ESADDI value for this nutrient. Nevertheless, FDA is proposing to establish RDI's for chloride to ensure that the agency provides values that are relevant to the full range of foods, including fabricated foods and foods for special dietary use.

Because the 10th edition of the NAS/NRC report does not contain an RDA or ESADDI value for chloride, the most appropriate source for establishing RDI's for this substance is the 9th edition (1980) of "Recommended Dietary Allowances" (Ref. 16). This earlier report from NAS/NRC provided ESADDI values for chloride, and research on chloride conducted in the last 10 years does not provide any basis to substantially change the conclusions set forth in that report (Ref. 6, p. 424). Consequently, relying on the 1980 ESADDI for chloride (see Table 10 of

Ref. 16), FDA calculated population-adjusted means for chloride in the same manner that it calculated values for nutrients with 1989 ESADDI's (Ref. 13). On the basis of these calculations, FDA is proposing RDI's in § 101.9(c)(10)(iv) for chloride for infants (650 milligrams), children less than 4 years of age (1,000 milligrams), persons 4 or more years of age (3,150 milligrams), pregnant women (3,400 milligrams), and lactating women (3,400 milligrams).

### 5. Nomenclature and Units of Measurement for RDI's

For the purpose of establishing the RDI's, FDA is proposing to use the nomenclature for nutrients specified by the International Union of Nutritional Sciences (IUNS) (Ref. 17). This action is a change from the agency's previous practice (38 FR 6954) which was to base the spelling and names of nutrients on the United States Pharmacopeia. FDA is proposing this change because the IUNS nomenclature is the nomenclature used in the relevant editions of "Recommended Dietary Allowances" issued by NAS/NRC (Refs. 2 and 16). These reports are an important basis for the RDI's and are recognized by the scientific nutrition community as authoritative for dietary allowances for essential nutrients.

Among the most notable effects of this proposed action is a change in the spelling of "thiamin." In previous regulations, thiamin was listed as "thiamine" in accordance with the United States Pharmacopeia. The IUNS nomenclature designates this nutrient as "thiamin."

As for units of measurement, FDA is proposing to use those specified in the 10th edition (1989) of the NAS/NRC "Recommended Dietary Allowances" (Ref. 2). For most nutrients, the units of measurement used in this report are grams, milligrams, and micrograms. However, for vitamin A, vitamin E, and niacin the units of measurement used in the report are retinol equivalents, *alpha*-tocopherol equivalents, and niacin equivalents, respectively. FDA will use these units of measurement for the RDI values for these three nutrients. FDA proposes to define the equivalent units as follows, based on the NAS/NRC

report: 1 retinol equivalent=1 microgram retinol or 6 micrograms *beta*-carotene; 1 *alpha*-tocopherol equivalent=1 microgram *d-alpha*-tocopherol; 1 niacin equivalent=1 milligram niacin or 60 milligrams of dietary tryptophan. As specified in the NAS/NRC report, FDA is also proposing to allow the following abbreviations for these units of measurement: "g" for "grams"; "mg" for "milligrams"; "mcg" for "micrograms"; "mcg RE" for "retinol equivalents"; "mcg *a*-TE" for "*alpha*-tocopherol equivalents"; and "mg NE" for niacin equivalents." This terminology is in accord with terminology used internationally.

### B. DRV's

#### 1. Caloric Basis for DRV's

Five of the eight food components for which DRV's are proposed (i.e., fat, saturated fatty acids, unsaturated fatty acids, carbohydrate, and fiber) require a specific caloric intake in order to quantify a reference value. The caloric intake is necessary because current recommendations concerning the intake of these components are based on percentages of total kilocalories in the diet. In this document, FDA will use the term "calories" rather than the more precise terms "kilocalories" or "energy." The use of "calories" to mean "kilocalories" or "energy" is commonly accepted, and FDA considers the use of the term "calories" to be more readily understood by consumers.

In developing the DRV's, FDA has calculated a reference caloric intake based on the population-adjusted mean of the recommended calorie (energy) allowance for persons 4 or more years of age (excluding pregnant and lactating women) as specified in Table 3-5 of the 10th edition of "Recommended Dietary Allowances" (Ref. 2). FDA used the same population distribution data and the same mathematical approach as described above for the RDI's. Using this approach, FDA calculated an adjusted mean caloric intake of 2,350 calories (Ref. 13). This value has served as the reference caloric intake in determining the DRV's.

## 2. Rationale for Specific DRV's

FDA is proposing to establish eight DRV's for persons 4 or more years of age based on discussions, recommendations, and guidelines presented in "Diet and Health" (Ref. 6) and the "Surgeon General's Report on Nutrition and Health" (Ref. 7) as well as the National Cholesterol Education Program's "Report of the Expert Panel on Population Strategies for Blood Cholesterol Reduction" (NCEP Report) (Ref. 9).

a. *Fat.* The "Diet and Health" report and the NCEP Report state that calories from total fat should contribute no more than 30 percent of total calories. This value is in agreement with the recommendations of other public health groups and societies such as the American Heart Association and the American Cancer Society (Ref. 6, Table 28-1). It is also the most common and consistent recommendation for the general public (Ref. 6, pp. 676-677). Thirty percent of the proposed reference caloric intake of 2,350 calories is 705 calories. Allowing 9 calories per gram of fat, 78 grams of fat will provide 705 calories. FDA is therefore proposing in § 101.9(c)(11)(i) that the DRV for fat be 75 grams (rounded down from 78 grams) which is the amount of fat that would furnish approximately 30 percent of the reference caloric intake. This value was rounded downward from 78 grams instead of rounded upward for two reasons. First, because the current dietary recommendations indicate that fat should be no more than 30 percent of calories, FDA believes it is inappropriate to allow a rounding factor to result in a DRV for fat that would be more than 30 percent of calories, although only slightly more. Second, the rounded down value of 75 grams is more consistent with the DRV's for saturated and unsaturated fatty acids in that the sum of the DRV's for these fatty acids (see below) will equal the DRV for total fat.

b. *Saturated fatty acids.* Specific quantitative guidelines for the amount of saturated fatty acids in the diet are provided by "Diet and Health" and the NCEP Report. These sources recommend that saturated fatty acids should provide no more than 10 percent of total calories. This value is consistent with the recommendations of other groups, both national and international (Ref. 6, Table 28-1). FDA is therefore proposing in § 101.9(c)(11)(i) that the DRV for saturated fatty acids be 25 grams (rounded down from 28 grams), which is the amount of saturated fatty acids that would furnish approximately 10 percent of the reference caloric intake.

c. *Unsaturated fatty acids.* FDA is proposing to establish a DRV for unsaturated fatty acids by subtracting the DRV for saturated fatty acids from the DRV for fat. The proposed DRV for fat is based on 30 percent of the reference caloric intake, while the DRV for saturated fatty acids is based on 10 percent of reference caloric intake. Thus, the remaining calories from fat not attributed to saturated fatty acids (i.e., 20 percent of calories) is designated as the percentage of calories to be contributed by unsaturated fatty acids. This approach is consistent with recommendations concerning the combined intake of polyunsaturated and monounsaturated fatty acids (Ref. 6, Table 28-1). FDA is therefore proposing in § 101.9(c)(11)(i) that the DRV for unsaturated fatty acids be 50 grams (rounded down from 52 grams) which is the amount of unsaturated fatty acids that would furnish approximately 20 percent of the reference caloric intake.

d. *Cholesterol.* "Diet and Health" and the NCEP Report recommend that individuals limit their daily intake of cholesterol to less than 300 milligrams. This recommended target level for cholesterol is consistent with the recommendations of a wide variety of public health groups and organizations, including the American Heart Association (Ref. 6, Table 28-1). FDA is therefore proposing in § 101.9(c)(11)(i) that the DRV for cholesterol be 300 milligrams.

e. *Carbohydrate.* "Diet and Health" recommends that the intake of total carbohydrate be increased to provide more than 55 percent of total calories. This value is in general agreement with the range of 50 to 60 percent of total calories recommended by the NCEP Report. FDA is therefore proposing in § 101.9(c)(11)(i) that the DRV for carbohydrate be 325 grams (rounded up from 323 grams), which is the amount of carbohydrate that would furnish approximately 55 percent of the reference caloric intake, allowing for 4 calories per gram of carbohydrate.

f. *Fiber.* "Diet and Health" and the Surgeon General's Report both recommend increased intake of complex carbohydrate, including dietary fiber. However, neither of these sources provides guidelines for establishing quantitative values for fiber intake. The "Diet and Health" report suggests that the evidence does not justify making specific recommendations with respect to fiber.

While there is a lack of consensus concerning quantitative values for fiber, several scientific bodies (Refs. 3, 7, 8, and 10) have recommended increased

intake levels for fiber on the basis that fiber may have important health benefits, particularly relative to intestinal function. Moreover, comments received by FDA indicate that many consumers and health professionals desire quantitative fiber content labeling.

The Life Sciences Research Organization, Federation of American Societies for Experimental Biology, recently issued a report from an ad hoc Expert Panel on Dietary Fiber (Ref. 10) that recommended an intake range of 20 to 35 grams per day of total dietary fiber from foods for the healthy adult population. This recommended range yields a daily intake of approximately 10 to 13 grams of dietary fiber per 1,000 calories. This value is in agreement with the recommendation of the National Cancer Institute (NCI) (Ref. 8) that Americans should double the amount of fiber they currently eat to levels of between 20 and 30 grams daily. NCI suggests that daily intake not exceed 35 grams. Therefore, FDA is proposing in § 101.9(c)(11)(i) that the DRV for fiber be 25 grams (rounded down from 27 grams), which is the midpoint of the Life Sciences Research Organization's recommended intake per 1,000 calories (i.e., 11.5 grams), adjusted for the reference caloric intake of 2,350 calories.

g. *Sodium.* The 1989 "Recommended Dietary Allowances" (Ref. 2) has acknowledged the essentiality of sodium in the diet by establishing 500 milligrams as an estimated minimum requirement for healthy adults. The report, however, does not specify an RDA or an ESADDI for sodium. "Diet and Health" provides for a recommended quantitative intake level for salt of 6 grams or less per day.

While some sodium is naturally present in foods, the majority of the current dietary intake of sodium results from ingestion of sodium chloride (i.e., salt) (Ref. 6). Therefore, FDA is proposing to establish a DRV for sodium based on the "Diet and Health" recommendation of 6 grams or less per day of salt. FDA converted milligrams of salt (i.e., sodium chloride) to milligrams of sodium by multiplying the recommended intake for salt by 0.40 (sodium chloride is 40 percent sodium). FDA is therefore proposing in § 101.9(c)(11)(i) that this calculated value, 2,400 milligrams, serve as the DRV for sodium.

h. *Potassium.* There is currently a limited agreement concerning the role of potassium in diet and health interrelationships. The 1989 NAS/NRC report (Ref. 2) provides an estimated minimum requirement for potassium (2,000 milligrams for adults) but did not

determine an RDA or ESADDI.

However, as documented by "Diet and Health," epidemiologic studies suggest that high levels of potassium may protect against certain disease conditions. "Diet and Health" states that an intake of 3,500 milligrams or more of potassium per day is associated with a beneficial effect. FDA is therefore proposing in § 101.9(c)(11)(i) to use this recommended intake of 3,500 milligrams as the DRV for potassium.

### 3. Units of measurement for DRV's

Based on the sources used to establish the DRV's, FDA has proposed DRV's in either gram or milligram units. As proposed for RDI's above, the following abbreviations for DRV's will be allowed: "g" for "grams" and "mg" for "milligrams."

### IV. Conforming Amendments

This proposed revision of the nutrition labeling regulations in § 101.9 to update the U.S. RDA values and redesignate the term "U.S. RDA" as "RDI" necessitates that, for consistency, FDA revise several other regulations in which either the term "U.S. RDA" or "U.S. RDA's" or the U.S. RDA values appear. The regulations affected by this proposed revision of 21 CFR 101.9 are § 101.3 *Identity labeling of food in packaged form* (21 CFR 101.3) and § 104.20 *Statement of purpose* (21 CFR 104.20).

FDA is therefore proposing to amend 21 CFR 101.3 in paragraph (e)(4)(ii) by removing the term "U.S. RDA" and inserting in its place the term "Reference Daily Intakes". FDA is also proposing to amend 21 CFR 104.20 in paragraph (a) by removing "U.S. RDA's" the two times it appears and replacing them with "Reference Daily Intakes (RDI's)" and "RDI's", respectively.

FDA is further proposing to amend § 104.20 by revising paragraph (c)(1), governing addition of nutrients to foods, to read as follows: "The nutrient is shown by adequate scientific documentation to have been lost in storage, handling, or processing in a measurable amount equal to at least 2 percent of the RDI (and 2 percent of 3.5 grams of potassium, when appropriate) (except for selenium, fluoride, and chromium, for which RDI's are established only for the purpose of declaring nutrients naturally present in a food) in a normal serving of the food." The change raising the gram level from 2.5 to 3.5 for potassium is necessary to be consistent with the proposed DRV for potassium used in nutrition labeling. The change deleting the reference to manganese is necessary because the agency has proposed an RDI for manganese as set forth in the table

below. The change regarding selenium, fluoride, and chromium is necessary because, as stated above, no sources of selenium, fluoride, and chromium are generally recognized as safe (GRAS) or are approved as food additives. Therefore, FDA has proposed that their reference values be established only for the purpose of declaring the levels of selenium, fluoride, and chromium naturally present in a food.

FDA is also proposing to amend § 104.20 by revising paragraph (d)(3) as follows: "The food contains all of the following nutrients per 100 calories based on 2,350-calorie total intake as a daily standard:

Nutrient	Unit of measurement <sup>1</sup>	RDI <sup>2</sup>	Amount per 100 calories
Protein.....	Grams.....	50	2.1
Vitamin A.....	Retinol equivalents.....	875	37
Vitamin C.....	Milligrams.....	60	2.6
Calcium.....	.....do.....	900	38
Iron.....	.....do.....	12	0.5
Vitamin D.....	Micrograms.....	6.5	0.3
Vitamin E.....	alpha-Tocopherol equivalents.....	9.0	0.4
Vitamin K.....	Micrograms.....	65	2.8
Thiamin.....	Milligrams.....	1.2	0.05
Riboflavin.....	.....do.....	1.4	0.06
Niacin.....	Niacin equivalents.....	16	0.7
Vitamin B <sub>6</sub> .....	Milligrams.....	1.5	0.06
Folate.....	Micrograms.....	180	7.7
Vitamin B <sub>12</sub> .....	.....do.....	2.0	0.09
Biotin.....	.....do.....	60	2.6
Pantothenic acid.....	Milligrams.....	5.5	0.2
Phosphorus.....	.....do.....	900	38
Magnesium.....	.....do.....	300	13
Zinc.....	.....do.....	13	0.6
Iodine.....	Micrograms.....	150	6.4
Copper.....	Milligrams.....	2.0	0.09
Manganese.....	.....do.....	3.5	0.15
Molybdenum.....	Micrograms.....	150	6.4
Chloride.....	Milligrams.....	3150	134

<sup>1</sup> RDI's also exist for selenium, fluoride, and chromium, but the RDI's for these three nutrients have been established only for the purpose of declaring the level of these nutrients naturally present in a food.

<sup>2</sup> RDI's for adults and children 4 or more years of age."

This change is necessary because the values in the current table are expressed on the basis of a 2,000 kilocalorie diet, and FDA is proposing that 2,350 kilocalories serve as the reference caloric intake. Additionally, for the purpose of simplification, FDA is proposing to use the term "calories" rather than the more precise term "kilocalories."

### V. Preemption

Numerous comments at the public hearings and on the ANPRM suggested that these Federal regulations on reference values for use in declaring nutrient content should explicitly preempt any State regulations on this subject. The preemption issue is complex and divisive: whether a uniform, national label is necessary for consumers and manufacturers to function in the marketplace versus whether States should be permitted to require additional information for their residents. The input of States, as well as consumers, businesses, and other concerned parties is essential in evaluating this matter. FDA therefore requests comment on the issue of whether preemption is appropriate.

### VI. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

### VII. Economic Impact

FDA is proposing several changes to the food product label: mandatory nutrition labeling, revision of the U.S. RDA's and standardization of serving sizes. Because these proposed changes are related and, if adopted, will become effective concurrently, the agency has considered their combined economic impacts and, where possible, separated out the contribution of each. If the proposed mandatory nutrition labeling requirements are adopted, manufacturers will have to change their food product labels. It is reasonable to expect that any additional label changes made to comply with this proposed rule would be implemented concurrently with those label changes being made in accordance with the mandatory nutrition labeling requirements. Thus, no additional costs are expected to be incurred in satisfying the requirements of this rule, as proposed, beyond those costs estimated for compliance with the mandatory nutrition labeling requirements.

Therefore, in accordance with Executive Order 12291, FDA has prepared a Preliminary Regulatory Impact Analysis (PRIA) that projects the combined economic effects of these proposed rules. In addition, this analysis satisfies the requirements of the Regulatory Flexibility Act (Pub. L. 96-354). FDA certifies that this proposed rule to provide for daily reference values

on the food label is not a major rule and will not have a significant impact on a substantial number of small entities, including small businesses. The PRIA is on file and may be seen at the Dockets Management Branch (address above).

#### VIII. Effective Date

FDA is proposing to make these regulations effective 1 year after the publication of a final rule. The agency's normal practice is to make food labeling regulations effective on the uniform effective date that follows publication of the final rule. However, the agency considers that a deviation from this practice is appropriate here because of the importance of the changes that the agency is proposing and because of the great consumer interest in these matters.

The agency recognizes that this proposed action will shorten the amount of time that manufacturers have to exhaust label inventories. However, the reduction in time will not be great, and the agency tentatively concludes that any costs that may result will be outweighed by the benefits from the improved nutrition label.

#### IX. References

The following information has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Food and Nutrition Board, Division of Biology and Agriculture, National Research Council, "Recommended Dietary Allowances, Seventh Edition, 1968," Washington, DC, Publication 1694, Printing and Publishing Office, National Academy of Sciences, 1968.
2. Subcommittee on the 10th Edition of the RDA's, Food and Nutrition Board, Commission on Life Sciences, National Research Council, "Recommended Dietary Allowances, 10th Edition," Washington, DC, National Academy Press, 1989.
3. Committee on Diet, Nutrition, and Cancer, Assembly of Life Sciences, National Research Council, "Diet, Nutrition, and Cancer," Washington, DC, National Academy Press, 1982.
4. U.S. Department of Agriculture and U.S. Department of Health and Human Services, "Nutrition and Your Health, Dietary Guidelines for Americans," Washington, DC, Home and Garden Bulletin No. 232, U.S. Government Printing Office, 1980.

5. U.S. Department of Agriculture and U.S. Department of Health and Human Services, "Nutrition and Your Health, Dietary Guidelines for Americans," Washington, DC, Home and Garden Bulletin No. 232, Second Edition, U.S. Government Printing Office, 1985.

6. Committee on Diet and Health, Food and Nutrition Board, Commission on Life Sciences, National Research Council, "Diet and Health: Implications for Reducing Chronic Disease Risk," Washington, DC, National Academy Press, 1989.

7. U.S. Department of Health and Human Services, Public Health Service, "The Surgeon General's Report on Nutrition and Health," Washington, DC, DHHS (PHS) Publication No. 89-50210, U.S. Government Printing Office, 1988.

8. Butrum, R. R., C. K. Clifford, and E. Lanza, "NCI Dietary Guidelines: Rationale," *American Journal of Clinical Nutrition*, 48:888-895, 1988.

9. Population Panel, National Cholesterol Education Program, National Heart, Lung, and Blood Institute, National Institutes of Health, "Report of the Expert Panel on Population Strategies for Blood Cholesterol Reduction," Bethesda, MD, Preprint: February 2, 1990.

10. Life Sciences Research Office, Federation of American Societies for Experimental Biology, "Physiological Effects and Health Consequences of Dietary Fiber," Bethesda, MD, 1987.

11. Martinez, G. A., and F. W. Krieger, "1984 Milk-Feeding Patterns in the United States," *Pediatrics*, 76:1004-1008, 1985.

12. U.S. Department of Commerce, Bureau of the Census, "United States Population Estimates, by Age, Sex, and Race: 1980 to 1987," Washington, DC, Current Population Reports Series P-25, No. 1022, U.S. Government Printing Office, March 1988.

13. Lewis, C. J., Memo to File, January 26, 1990.

14. National Center for Health Statistics, "Advance Report of Final Natality Statistics, 1988," Monthly Vital Statistics Report, Vol. 37, No. 3 Supp., DHHS Pub. No. (PHS) 89-1120, Public Health Service, Hyattsville, MD, July 12, 1988.

15. National Center for Health Statistics, "Advance Report of Final Natality Statistics, 1987," Monthly Vital Statistics Report, Vol. 37, No. 3, Supp., DHHS Pub. No. (PHS) 89-1120, Public Health Service, Hyattsville, MD, June 29, 1989.

16. Committee on Dietary Allowances, Food and Nutrition Board, Assembly of Life Sciences, National Research Council, "Recommended Dietary Allowances: Ninth Revised Edition, 1980," Washington, DC, National Academy Press, 1980.

17. International Union of Nutritional Sciences, Committee 1/I, Nomenclature, "Generic Descriptors and Trivial Names for Vitamins and Related Compounds: Recommendations (1976)," *Nutrition Abstracts and Reviews*, 48A: 631-635, 1978.

#### List of Subjects

##### 21 CFR Part 101

Food labeling, Reporting and recordkeeping requirements.

##### 21 CFR Part 104

Food grades and standards, Frozen foods, Nutrition.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 101 and 104 be amended as follows:

#### PART 101—FOOD LABELING

1. The authority citation for 21 CFR Part 101 continues to read as follows:

**Authority:** Secs. 4, 5, 8 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

##### § 101.3 [Amended].

2. Section 101.3 is amended in paragraph (e)(4)(ii) by removing "U.S. RDA" and replacing it with "Reference Daily Intakes".

3. Section 101.9 is amended by adding paragraphs (c)(7)(iii), (c)(10)(iv), and (c)(11)(i) to read as follows [These changes further amend proposed § 101.9 published elsewhere in this issue]:

##### § 101.9 Nutrition labeling of food.

\* \* \* \* \*

(c) \* \* \*

(7) \* \* \*

(iii) For the purpose of labeling with a percent of the RDI, a value of 50 grams of protein shall be the RDI for adults and children 4 or more years of age, 16 grams of protein for children less than 4 years of age, and 14 grams of protein for infants.

\* \* \* \* \*

(10) \* \* \*

(iv) The following RDI's and nomenclature are established for the following vitamins and minerals which are essential in human nutrition:

Nutrient	Unit of measurement <sup>1</sup>	Adults and children 4 or more years of age	Children less than 4 years of age <sup>2</sup>	Infants <sup>3</sup>	Pregnant women	Lactating women
Vitamin A	Retinol equivalents <sup>4</sup>	675	400	375	800	1300
Vitamin C	Milligrams	60	40	33	70	95
Calcium	do	900	800	500	1200	1200
Iron	do	12	10	8.0	30	15
Vitamin D	Micrograms <sup>5</sup>	6.5	10	9.0	10	10

Nutrient	Unit of measurement <sup>1</sup>	Adults and children 4 or more years of age	Children less than 4 years of age <sup>2</sup>	Infants <sup>3</sup>	Pregnant women	Lactating women
Vitamin E	<i>alpha</i> -Tocopherol equivalents <sup>4</sup>	9.0	6.0	3.5	10	12
Vitamin K	Micrograms	85	15	7.5	65	65
Thiamin	Milligrams	1.2	0.7	0.4	1.5	1.6
Riboflavin	do	1.4	0.8	0.5	1.6	1.8
Niacin	Niacin equivalents <sup>4</sup>	16	9.0	5.5	17	20
Vitamin B <sub>6</sub>	Micrograms	1.5	1.0	0.5	2.2	2.1
Folate	Micrograms	180	50	30	400	280
Vitamin B <sub>12</sub>	do	2.0	0.7	0.4	2.2	2.6
Biotin	do	60	20	13	65	65
Pantothenic acid	Milligrams	5.5	3.0	2.5	5.5	5.5
Phosphorus	do	900	800	400	1200	1200
Magnesium	do	300	80	50	320	355
Zinc	do	13	10	5.0	15	19
Iodine	Micrograms	150	70	45	175	200
Selenium	do	55	20	13	65	75
Copper	Milligrams	2.0	0.9	0.6	2.5	2.5
Manganese	do	3.5	1.3	0.8	3.5	3.5
Fluoride	do	2.5	1.0	0.5	3.0	3.0
Chromium	Micrograms	120	50	33	13	130
Molybdenum	do	150	38	26	160	160
Chloride	Milligrams	3150	1000	650	3400	3400

<sup>1</sup> The following abbreviations are allowed: "mg" for "milligrams"; "mcg" for "micrograms"; "mcg RE" for "retinol equivalents"; "mg  $\alpha$ -TE" for *alpha*-tocopherol equivalents; "mg NE" for "niacin equivalents."

<sup>2</sup> The term "children less than 4 years of age" means persons 13 through 47 months of age.

<sup>3</sup> The term "infants" means persons not more than 12 months of age.

<sup>4</sup> 1 retinol equivalent = 1 microgram retinol or 6 micrograms *beta*-carotene; 1 *alpha*-tocopherol equivalent = 1 milligram *d-alpha*-tocopherol; 1 niacin equivalent = 1 milligram niacin or 60 milligrams of dietary tryptophan.

<sup>5</sup> As cholecalciferol.

(11) \*\*\*

(i) The following DRV's are established for the following food components based on a population-adjusted mean of the recommended caloric intake (i.e., 2,350 calories):

Food component	Unit of measurement <sup>1</sup>	DRV
Fat	Grams	75
Saturated fatty acids	do	25
Unsaturated fatty acids	do	50
Cholesterol	Milligrams	300
Carbohydrate	Grams	325
Fiber	do	25
Sodium	Milligrams	2400
Potassium	do	3500

<sup>1</sup> The following abbreviations are allowed: "g" for "grams" and "mg" for "milligrams."

## PART 104—NUTRITIONAL QUALITY GUIDELINES FOR FOODS

4. The authority citation for 21 CFR part 104 continues to read as follows:

Authority: Secs. 201, 403, 701(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 343, 371(a)).

5. Section 104.20 is amended in paragraph (a) by removing "U.S. RDA's" the two times it appears and replacing it with "Reference Daily Intakes (RDI's)" and "RDI's", respectively, and by revising paragraphs (c)(1) and (d)(3) to read as follows:

### § 104.20 Statement of purpose.

\*\*\*

(c) \*\*\*  
(1) The nutrient is shown by adequate scientific documentation to have been lost in storage, handling, or processing in a measurable amount equal to at least 2 percent of the Reference Daily Intake (RDI) (and 2 percent of 3.5 grams of potassium, when appropriate) [except for selenium, fluoride, and chromium, for which RDI's are established only for the purpose of declaring nutrients naturally present in a food] in a normal serving of the food.

\*\*\*

(d) \*\*\*  
(3) The food contains all of the following nutrients per 100 calories based on 2,350-calorie total intake as a daily standard:

Nutrient	Unit of measurement <sup>1</sup>	RDI <sup>2</sup>	Amount per 100 calories
Protein	Grams	50	2.0
Vitamin A	Retinol equivalents	875	37
Vitamin C	Milligrams	60	2.6
Calcium	do	900	38
Iron	do	12	0.5
Vitamin D	Micrograms	6.5	0.3
Vitamin E	<i>alpha</i> -Tocopherol equivalents	9.0	0.4
Vitamin K	Micrograms	65	2.8
Thiamin	Milligrams	1.2	0.05
Riboflavin	do	1.4	0.06

Nutrient	Unit of measurement <sup>1</sup>	RDI <sup>2</sup>	Amount per 100 calories
Niacin	Niacin equivalents	16	0.7
Vitamin B <sub>6</sub>	Milligrams	1.5	0.06
Folate	Micrograms	180	7.7
Vitamin B <sub>12</sub>	do	2.0	0.09
Biotin	do	60	2.6
Pantothenic acid	Milligrams	5.5	0.2
Phosphorus	do	900	38
Magnesium	do	300	13
Zinc	do	13	0.6
Iodine	Micrograms	150	6.4
Copper	Milligrams	2.0	0.09
Manganese	do	3.5	0.15
Molybdenum	Micrograms	150	6.4
Chloride	Milligrams	3150	134

<sup>1</sup> RDI's also exist for selenium, fluoride, and chromium but the RDI's for these three nutrients have been established only for the purpose of declaring nutrients naturally present in a food.

<sup>2</sup> RDI's for adults and children 4 or more years of age.

\*\*\*

Dated: June 5, 1990.

James S. Benson,

Acting Commissioner of Food and Drugs.

Louis W. Sullivan,

Secretary of Health and Human Services.

[FR Doc. 90-16727 Filed 7-13-90; 3:14 pm]

BILLING CODE 4160-01-M

**21 CFR Parts 101 and 105**

[Docket No. 90N-0135]

RIN 0905-AD08

**Food Labeling; Mandatory Status of Nutrition Labeling and Nutrient Content Revision****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to amend its food labeling regulations to require nutrition labeling on most food products that are meaningful sources of nutrients and to revise the list of required nutrients and the conditions for listing nutrients in nutrition labeling. The agency is proposing these amendments in response to the expanding scientific knowledge about the relationship between certain food components and health which has created increased public interest in the nutritional contribution of food products. FDA is proposing to revise the list of required nutrients and food components in nutrition labeling to add calories from fat, saturated fatty acids, cholesterol, and dietary fiber and to make the listing of thiamin, riboflavin, and niacin optional rather than mandatory. The proposal also addresses conditions under which other nutrients could be, or are required to be, included in nutrition labeling and would allow for the voluntary inclusion in nutrition labeling of a nutrition profile based on Daily Reference Values (DRV's) of selected food components.

**DATES:** Written comments by November 16, 1990. The agency is proposing that any final rule that may issue based upon this proposal become effective 1 year following publication of any final rule based upon this proposal.

**ADDRESSES:** Written comments may be sent to the Dockets to Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

**FOR FURTHER INFORMATION CONTACT:** F. Edward Scarbrough, Center for Food Safety and Applied Nutrition (HFF-200), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-245-1581.

**SUPPLEMENTARY INFORMATION:****I. Background****A. Overview**

With the publication of this notice, the Department of Health and Human Services marks the opening of its major initiative to reform the nation's food labeling system. Concerned that current food labels do not allow Americans to take full advantage of the latest advances in nutrition science, Secretary of Health and Human Services Louis W. Sullivan last summer asked FDA to consider "sweeping changes" in the way foods are labeled.

FDA responded quickly to Secretary Sullivan's charge. In the *Federal Register* of August 8, 1989 (54 FR 32610), FDA published an advance notice of proposed rulemaking (ANPRM) that solicited public comment on a wide range of food labeling issues to help the agency determine what, if any, changes in food labeling requirements were necessary to make the food label more useful and understandable to consumers. FDA also held four national public hearings on food labeling last fall. Some 200 people, representing a cross-section of interested parties, including consumers, health professionals, trade associations and food industry representatives, and State and local health officials, testified at these hearings. In addition, 1,500 more persons participated in 50 local "consumer exchange" meetings. The responses to these hearings and meetings, as well as the 7,000 written responses to the ANPRM, demonstrate broad public support for a thorough modernization of food labeling.

On March 7, 1990, Secretary Sullivan unveiled the Department's comprehensive plan to improve the quality and quantity of information available on the food label. The Secretary pledged to encourage healthier eating by providing consumers the information they need to make sound food choices.

One month earlier, the Department had already demonstrated its commitment to appropriate food labeling by repropounding a way to assure that food labels convey only those health messages that are truthful and accurate, and by announcing an interim enforcement policy to take action against products with unfounded claims.

In announcing his comprehensive food labeling plan, Secretary Sullivan stated that the implementation of this initiative would be governed by two principles, namely, (1) that he would give priority to labeling changes that the agency believes will have the greatest public health benefit, and (2) that he would enact labeling reforms in phases, as

issues are resolved, rather than wait for a consensus on all aspects of the food label. The Secretary also provided a schedule of the plan's several major elements.

This schedule provided proposals for the scope and content of nutrition labeling to be published by mid-1990. This current notice is the central document for the first phase of food label reforms. It proposes mandatory nutrition labeling for most foods that are a meaningful source of nutrition, as defined in this proposal, and it also proposes revisions in the content of food labeling.

This proposal would greatly expand the availability of label information about the nutritional value of food, by extending nutrition labeling to most of the American food supply. Currently, based on sales, approximately 60 percent of the processed and packaged foods regulated by FDA carry nutrition labeling. This proposal would revise what is listed on the nutrition label, by making optional the declaration of certain food components currently required, and by making new ones standard requirements.

In addition, two notices published elsewhere in this issue of the *Federal Register* may be viewed as companion technical documents to this one: (1) A proposal revising U.S. Recommended Daily Intakes for protein, vitamins, and minerals; and (2) a proposal to establish a means of determining a reasonable and consistent serving size.

A fourth document, also published elsewhere in this issue of the *Federal Register*, focuses on cholesterol labeling, a related food labeling policy that was already under development when the broader food labeling initiative was announced last summer.

Taken together, these documents represent the first phase of the Department's comprehensive initiative to reform food labeling. The Department expects to publish a second phase of proposals, which will focus on definitions of food descriptors such as "low fat" and "high fiber" and improved ingredient labeling, by the end of the year. During 1991, the Department intends to publish a final rule on health messages, and also expects to be well into market research that will help identify a new label format.

**B. The ANPRM**

In the *Federal Register* of August 8, 1989 (54 FR 32610), FDA published an advance notice of proposed rulemaking (ANPRM) that solicited public comment on a wide range of food labeling issues to help the agency determine what, if

any, changes in food labeling requirements should be proposed. The agency specifically requested public comment on five areas: (1) Whether to revise requirements for nutrition labeling, (2) whether to change the nutrition label format, (3) whether to revise the requirements for ingredient labeling, (4) whether to formally define commonly used food descriptions and whether to reconsider the use of standards of identity for foods; and (5) whether, and how, to reasonably permit the use of health messages on food labels that describe the role of food components in reducing the risk of disease. FDA also noted that it planned to hold a series of public hearings to provide additional opportunities to submit information concerning necessary food labeling revisions. Public comments were to be submitted by December 8, 1989.

FDA extended the comment period in the *Federal Register* of September 20, 1989 (54 FR 38806) until January 5, 1990. In the September 20, 1989, notice, FDA also announced the location, dates, and areas of focus for four hearings on food labeling. These were: Chicago, IL, on October 16, 1989, focusing on nutrition label content; San Antonio, TX, on November 1, 1989, focusing on ingredient labeling, food standards, and food descriptors; Seattle, WA, on December 7, 1989, focusing on health messages; and Atlanta, GA, on December 13, 1989, focusing on nutrition label format.

In the ANPRM, FDA noted that the current nutrition labeling regulations were promulgated almost 20 years ago and stated that it believed that this was an appropriate time to review the regulations to determine if changes should be made in the list of nutrients and food components required to be declared in the nutrition label. The agency therefore requested comments on the following questions about nutrition labeling: (1) Are there currently required nutrients that could become optional elements (2) Are there currently optional nutrients that should be made required elements (3) Are there other nutrients or food components that should now be made either optional or required (4) Should changes be made in how the fat content of a food is presented (5) Should changes be made in how the carbohydrate content of a food is declared (6) Should fiber be included in the nutrition label and (7) Is it necessary for all foods to have the same nutrition labeling, or is it possible to design nutrition labeling requirements that vary depending on the class or type of food?

FDA also asked for comments on whether nutrition labeling should be made mandatory for more foods, and, if so, how this could best be accomplished. Nutrition labeling is currently voluntary unless: (1) A nutrition claim, other than sodium content, is made on the label or in advertising, or (2) any vitamin, mineral, or protein is added to the food.

While the August 8, 1989, ANPRM requested comments on many other aspects of food labeling, this proposal responds to the comments on the above questions regarding nutrition labeling content and whether nutrition labeling should be mandatory. Other food labeling issues considered in the ANPRM and at the hearings will be dealt with in other Federal Register documents. The agency has attempted to address these comments in this proposal. If there are any significant concerns that the agency has not addressed, these concerns should be brought to the agency's attention in comments on this proposal.

In response to the *Federal Register* notices, FDA received approximately 2,000 letters of comment and 5,000 survey forms distributed by a consumer organization and printed in many local newspapers. The comments represented the views of consumers, consumer organizations, health professionals, academicians, food industry officials, trade associations, and foreign, State and local government agencies. Approximately 200 persons offered oral testimony at the four public hearings. Roughly one-third of these individuals were consumers and representatives of consumer organizations, one-third were industry representatives, and one-third were health professionals, university faculty, State and local government officials, and others.

During this same time period, about 50 district consumer exchange meetings (DCEM's) were held by FDA to address the food labeling issues discussed in the ANPRM. These DCEM's were held in 22 States, and about 1,500 individuals participated in them. A diverse cross-section of the American public was reached through the DCEM's and encouraged to comment on the ANPRM. The DCEM's targeted rural and metropolitan communities, dietitians, nutritionists, other health professionals, minorities, students, the elderly, the disabled, and the economically disadvantaged.

#### C. Regulatory History

The 1969 White House Conference on Food, Nutrition, and Health recommended that FDA develop a system for labeling the nutritional qualities of food. FDA accepted this

recommendation, and in 1970 initiated activities directed toward the development of nutrition labeling, which included expert consultation and consumer testing of alternative labeling systems. These activities led to the publication of a proposed rule in 1972 (37 FR 6493; March 30, 1972). Based on comments received on the proposal, the agency promulgated a new section under Title 21 for nutrition labeling (21 CFR 1.17 (recodified as 21 CFR 101.9 in the *Federal Register* of March 15, 1977 (42 FR 14302))) on January 19, 1973 (38 FR 2125). These regulations were repromulgated on March 14, 1973 (38 FR 6951) to reflect technical modifications in accordance with additional comments and other relevant information.

The regulations provided for voluntary nutrition labeling unless a nutrient is added to a product or a nutrition claim (other than sodium content) is made. Nutrient quantities were to be declared in relation to the average or usual serving of the product as packaged and expressed in common household terms or easily identifiable units. The required format for nutrition labeling included a tabular listing of calorie content; the amounts in grams of protein, carbohydrate, and fat; and the percentages of U.S. Recommended Daily Allowances (U.S. RDA) for protein and seven vitamins and minerals (vitamin A, vitamin C, thiamine, riboflavin, niacin, calcium, and iron). Manufacturers were given the option of listing additional vitamins and minerals.

The agency stated that the declaration of nutrients was to be based on analytical testing of the manufacturer's product. The agency in 1973 also encouraged industry to provide data for a nutrient data bank being established by the U.S. Department of Agriculture. At that time, data from survey averages were considered to be incomplete, and therefore unsuitable, as a basis for labeling claims. Analysis of sufficient individual lots was considered essential to give assurance that the labeled value adequately represented the product offered.

Foods exempt from nutrition labeling or subject to special labeling regulations in 1973 included: foods for infants and children under 4 years of age covered by special dietary foods regulations; foods represented for use solely under medical supervision; iodized salt; standardized foods with added nutrients; and foods in which a nutrient was included solely for technological purposes if declared only in the ingredient statement. FDA amended the nutrition labeling regulations (§ 1.17(h)(10) (recodified as § 101.9(h)(10) in the *Federal Register* of

March 15, 1977 (42 FR 14302)) on November 28, 1973, to provide an exemption for fresh fruits and fresh vegetables, pending promulgation of specific labeling requirements for these foods (38 FR 32786; November 28, 1973).

On March 6, 1974 (39 FR 8621), FDA published a proposal to exempt foods that are not meaningful sources of nutrients from full nutrition labeling. Under this proposal, a shortened listing of nutrients would have been allowed for foods that provide less than 2 percent of the U.S. RDA of protein, vitamins, and minerals and for foods that provide less than 25 calories per serving or that provide calories derived from only a single component. Based on comments that argued that the abbreviated format proposed offered little advantage over the full format, however, the agency withdrew the proposal (42 FR 27261; May 27, 1977).

On January 19, 1973, FDA published a final regulation (21 CFR 1.18 (recodified as 101.25 in the Federal Register of March 15, 1977 (42 FR 14302))) which provided for the labeling of cholesterol and fatty acid composition on a voluntary basis (38 FR 2125 at 2132). This regulation was amended on March 14, 1973 (38 FR 6961). It required the declaration of the percent of calories from fat and the content of polyunsaturated and saturated fatty acids whenever fatty acid content was declared. The regulation also required that food labels with fatty acid or cholesterol information bear a statement that the information is provided for individuals who are modifying their diet on the advice of a physician.

On November 19, 1976, FDA published a policy statement (21 CFR 3.207 (recodified as § 101.10 in the Federal Register of March 15, 1977 (42 FR 14302))) on the nutrition labeling of restaurant foods. The policy stated that nutrition information concerning combinations of restaurant foods, such as a hamburger, french fries, and a milkshake, could be included in advertising or labeling (other than labels) without causing nutrition information to be required on the label of each article of food, provided that appropriate nutrition information is effectively displayed to the customer both when the food is ordered, and when the food is consumed (see 21 CFR 101.10). The policy statement does not apply to packaged food dispensed in automatic vending machines.

FDA published a notice on June 9, 1978 (43 FR 25296), announcing a series of five public hearings to be held jointly with the U.S. Department of Agriculture (USDA) and the Federal Trade Commission (FTC) to discuss several

issues related to food labeling, one of which was nutrition labeling. The public hearings were held across the nation between August and October 1978.

In an advance notice of proposed rulemaking (1979 ANPRM) following the hearings and the agencies' analysis of comments, the three agencies announced their tentative positions on the several food labeling issues (44 FR 75990; December 21, 1979). Three main questions characterized the issues concerning nutrition labeling: (1) Should nutrition labeling be required on foods? (2) If so, what information should it furnish? (3) What form should that information take? Most oral and written comments favored a system of mandatory nutrition labeling. FDA stated in the 1979 ANPRM that, because its authority to require nutrition labeling on all food products was unclear, its proposed position was to seek or support legislation to clarify this authority. FDA further announced that it intended to continue its policies for declaring mandatory nutrients, calories, and other information such as serving size and servings per container. However, FDA and USDA asked for specific public comments on whether the current list of nutrients required in nutrition labeling should be retained or expanded.

The agency has continued to focus efforts on several issues raised in the 1979 ANPRM such as fiber, sodium, cholesterol, fatty acids, and the use of data bases for deriving appropriate nutrient values for nutrition labeling. In the 1979 ANPRM, FDA and USDA announced that their proposed position was not to require dietary fiber as part of nutrition labeling until a clear consensus developed on a definition of dietary fiber, until methods of analysis for fiber content were developed, and until the significance of dietary fiber became better understood. Since 1979, these three preconditions have been satisfied. FDA has taken a lead role in defining dietary fiber and in developing appropriate analytical methodology. Also, research findings have enabled scientists to better understand health benefits linked to fiber consumption. As a result, dietary guidelines (Refs. 1 through 3) now recommend that Americans consume more dietary fiber from a variety of food sources. Thus, the significance of dietary fiber is far clearer today than in 1979.

On April 18, 1984 (49 FR 15510), FDA published final nutrition labeling regulations on sodium (§ 101.9(c)(8)(i)) and potassium (§ 101.9(c)(8)(ii)), which specify that the sodium content of food must be included in nutrition labeling information whenever nutrition labeling

appears on food labels and provide for the voluntary listing of potassium content. The agency also issued a policy statement that it would continue to permit the declaration of sodium content without triggering mandatory nutrition labeling.

On November 25, 1986 (51 FR 42584), FDA proposed to amend the food labeling regulations regarding declaration of the cholesterol and fatty acid content of foods. The agency proposed to define the terms "cholesterol free," "low cholesterol," and "reduced cholesterol," and that the declaration of either fatty acid or cholesterol content would require the declaration of both on the nutrition label. FDA also proposed to remove the requirements: (1) that labels that bear fatty acid or cholesterol information also bear a statement that the information is for individuals modifying their diet on the advice of a physician (§ 101.25(d)), (2) that percent of calories from fat be declared whenever a food bears fatty acid content information (§ 101.25(c)(2)(i)), and (3) that cholesterol content be declared per 100 grams of food as well as per serving whenever it is included in nutrition labeling (§ 101.25(b)(2)(ii)). Elsewhere in this issue of the Federal Register, FDA is issuing a tentative final rule on cholesterol labeling.

Another nutrition labeling issue discussed in the 1979 ANPRM was whether food manufacturers and producers either should be required to ensure that their food labels accurately reflected the nutrient composition of their products, principally by analyzing individual lots of their products (which is the current policy), or should be allowed to use composite data bases for deriving appropriate nutrient values for labeling. In the 1979 ANPRM, FDA and USDA set forth the following policy concerning the use of nutrient data bases:

FDA and USDA encourage industry to develop and maintain meaningful data bases that may be useful guides for determining the nutrient values of indigenous nutrients. FDA and USDA likewise encourage industry to submit such data bases to them so that they may judge their applicability for use in nutrition labeling. The sampling plans and statistical factors to be used in developing the accuracy of the nutrient profile appearing on the label will be determined according to the food and the nutrient, for each data base. This evaluation will not constitute approval, but it will assist industry in developing and interpreting a data base for nutrition labeling.

FDA and USDA encourage the use of properly evaluated data bases for all appropriate segments of industry.

The use of a suitable nutrient data base does not exempt a manufacturer from assuring that a product meets its labeled nutrient content within established limits. The agencies consider this provision necessary to ensure proper handling of foods and their proper processing to prevent gross nutrient loss (loss of unstable nutrients, for example). The establishment of reasonable ranges of nutrients to accommodate natural variation is under consideration.

If products bearing nutrition labeling in accordance with properly evaluated nutrient data bases and manufactured in accordance with good manufacturing practices are found not to be in compliance with applicable nutrition labeling regulations, the agencies will work with the firms responsible for the product in question and with the appropriate authorities who are maintaining the applicable nutrient data base to correct the problem before initiating compliance provisions actions. The agencies will continue to reexamine compliance of the nutrition labeling regulations and will consider appropriate revisions as new knowledge, data, and methodology become available.

(44 FR 76003).

Several groups, principally trade associations, have taken advantage of this stated policy. FDA has worked with the groups by suggesting sampling procedures and data analysis, and by reviewing collected data and proposed nutrition labels. To date, FDA has reviewed data bases for approximately 30 commodities. The commodities include fresh produce, snack foods, and eggs. FDA is currently reviewing data bases for several additional commodities.

#### *D. Need To Change*

Comments received by FDA as a result of the 1989 ANPRM and at the recent public hearings indicate a great desire for nutrition labeling on more foods and for more label information about food components that have been identified as important in maintaining good health.

Public health concerns about the relationship between diet and health, including the role of food components in the etiology of certain chronic diseases, have grown during the last 20 years. At the same time, concerns about classical nutritional deficiencies have lessened as a result of an abundant food supply, food enrichment and fortification programs, and nutrition education. Thus, while there is a need to maintain the general nutritional adequacy and safety of the U.S. food supply, there is also a need for greater emphasis on food components that may be important to good health.

Two recent publications have addressed the role of diet in the maintenance of good health by

reviewing the evidence relating typical American dietary patterns to the incidence of chronic diseases that are the leading causes of death and disability in this country. These are "The Surgeon General's Report on Nutrition and Health" (1988) (Ref. 1) and the National Academy of Sciences' report "Diet and Health, Implications for Reducing Chronic Disease Risk" (1989) (Ref. 2). Both of these reports conclude that the preponderance of the evidence substantiates an association between dietary factors and rates of chronic disease. They also suggest that changes in current dietary patterns, namely, reducing consumption of fat, saturated fatty acids, cholesterol, and sodium, and increasing amounts of complex carbohydrates and fiber, could lead to a reduced incidence of certain chronic diseases.

These recommendations support current Federal nutrition policy as stated in the "Dietary Guidelines for Americans" (Ref. 3), issued jointly by the Department of Health and Human Services (DHHS) and USDA in 1980 and revised in 1985. These dietary guidelines recommend that Americans: eat a variety of foods; maintain desirable weight; avoid too much fat, saturated fat, and cholesterol; eat foods with adequate starch and fiber; avoid too much sugar; avoid too much sodium; and drink alcoholic beverages only in moderation, if at all.

These reports and dietary guidelines (hereinafter referred to as "reports") also make useful suggestions for planning healthy diets. However, without specific nutrition information on food labels, consumers would be unable to determine how certain individual foods fit into dietary regimens that adhere to these reports. Because the nutrition labeling regulations do not require, and in some cases do not provide for, information about some of the food components that, according to the reports, are most significant, changes in when nutrition labeling is required, and in the content of nutrition labeling, are necessary if food labels are to be useful to consumers in adhering to the recommendations in the reports.

According to FDA's latest Food Labeling and Packaging Survey (Ref. 4), based on sales, approximately 60 percent of processed and packaged foods regulated by FDA carry nutrition labeling. However, consumers, in their comments and at the hearings, expressed a strong interest in having nutrition information appear on the labels of more food products. While some of the comments the agency has received addressed the need for exemptions for specific types of foods or

packaging, the overwhelming sentiment was that nutrition labeling is important to the public health, and that if nutrition labeling is going to assist consumers in making appropriate dietary selections that will positively affect their total daily diet, it should be made mandatory on most foods.

#### *E. FDA's Response to Need To Change*

FDA announced in the August 8, 1989, ANPRM its intent to consider significant revisions in food labeling. Based on the response to the ANPRM and on the testimony given at the public hearings, the agency is convinced of the need to revise and to improve many aspects of food labeling.

FDA's food labeling initiative covers the full spectrum of food labeling: Nutrition labeling, ingredient labeling, food descriptors (such as "low fat"), label format, health messages, and food standards. Within its limited resources, the agency is prepared to undertake a comprehensive reform of the labeling of all foods regulated by the agency using two principles to guide its approach: First, FDA will give priority to labeling changes that the agency believes will have the greatest public health impact. Second, rather than wait for unanimous agreement on all aspects of the food label, FDA will propose reforms when the agency believes there is a reasonable scientific basis on which to resolve significant issues.

In giving priority to labeling changes that the agency believes will have the greatest impact on public health, FDA is focusing first on nutrition labeling. Because of the growing body of scientific evidence on the relationship between diet and health, FDA believes that improved mandatory nutrition labeling could yield the greatest public health benefit. This document proposes to require nutrition labeling of most foods that are meaningful sources of calories or nutrients and to revise the list of nutrients and food components that are to be declared. As a part of this action, in a separate document appearing elsewhere in this issue of the Federal Register, FDA is proposing to revise the U.S. RDA's used in nutrition labeling, and to change their name to "Reference Daily Intakes (RDI's)," for protein, vitamins, and minerals. The agency also is proposing to establish a new set of reference standards, termed "Daily Reference Values (DRV's)," for fat, fatty acids, cholesterol, carbohydrate, dietary fiber, sodium, and potassium. FDA also is publishing in this issue of the Federal Register a proposed rule addressing how serving sizes, which provide the basis for quantitative

declarations within nutrition labeling, are to be determined. Consistency and reasonableness of serving size are critical to the consumer's ability to understand and to compare nutrition labels.

Another aspect of nutrition labeling, the format in which it is presented, is also being examined by the agency. The current nutrition label is presented in a tabular format, with values for nutrients (other than calories) given in columns of metric measurements and percentages. Many comments stated that this format is confusing to consumers, and that an alternative method of presentation (such as graphic bar graphs or pie charts) may be more easily understood. However, comments also cautioned against making changes in the required format without consumer testing to determine which formats are most effective in communicating nutrition information. The agency is in agreement with these comments and will proceed with consumer testing before issuing a proposal for changing nutrition labeling format.

## II. Mandatory Nutrition Labeling—Legal Authority

### A. The Standard

The Food, Drug, and Cosmetic Act (the act) does not explicitly address the questions of whether, and if so when, nutrition labeling is necessary to prevent a food from being misbranded. This fact is not determinative, however, in deciding whether the act provides authority for FDA to require nutrition labeling on most foods.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), the Supreme Court stated that if a statute is silent with respect to a specific issue, the question becomes whether the agency's policy is based on a permissible construction of the statute. The Court recognized that "[t]he power of an administrative agency to administer a Congressionally created \* \* \* program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.*, quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). The Court went on to make clear that where a delegation of authority is implicit, an agency's rules will be upheld if they represent a reasonable interpretation of the statutory provision. *Id.* at 844. As explained below, FDA has concluded that the act can be reasonably interpreted to require nutrition labeling on all foods that are meaningful sources of nutrition. Of course, the agency will consider

carefully any comments it receives on its legal analysis.

### B. Background

In 1973, when FDA adopted the current regulation that deals with nutrition labeling, it received numerous requests to make nutrition labeling mandatory (see 38 FR 2125 (January 19, 1973) and 38 FR 6951 (March 14, 1973)). The agency did not do so, however, because it believed that such action was not appropriate given the lack of information about the nutrient content of certain foods and given the inability of many manufacturers, processors, and distributors to analyze the nutrient content of their products (38 FR 2125). The agency stated that experience under the nutrition labeling regulation was necessary before expansion of nutrition labeling to all foods on a mandatory basis could be considered (38 FR 2125). Implicit in this response, however, is the conclusion that FDA has the authority to make nutrition labeling mandatory.<sup>1</sup>

Given the agency's concerns about the lack of information about nutrient content and about the inability to determine nutrient content, FDA established in 1973 a limited, conditional nutrition labeling requirement (§ 101.9) under sections 403(a)(1), 201(n), and 701(a) of the act (21 U.S.C. 343(a), 321(n), and 371(a)). Under section 403(a)(1) of the act, a food is misbranded if its labeling is false or misleading in any particular. Under section 201(n) of the act, the labeling of a food is misleading if it fails to reveal facts that are material in light of representations actually made in the labeling. Finally, under section 701(a) of the act, the agency has authority to promulgate regulations for the efficient enforcement of the act.

Under current § 101.9, nutrition labeling must be included on the label of a food only when a nutrient has been added to the food, or when the labeling or advertising for the food includes a claim or other representation about the food's nutritional properties, its fat or caloric content, or its usefulness in the daily diet (38 FR 2125). The agency made clear in adopting the regulation that nutrition labeling is necessary in such circumstances to ensure that the labeling of the food would not be

misleading because it failed to reveal facts that were material in light of the representations that were being made:

Only by having available this full nutrition labeling for a food to which a nutrient is added or for which such claim or information is provided can such claim or information be evaluated and understood, and the food properly used in the diet. Without full nutrition labeling such claims or information would be confusing and misleading for lack of completeness, and could deceive consumers about the nutritional value of the food, its overall nutritional contribution to the daily diet, and its nutritional weaknesses as well as strengths.

38 FR 2125.

### C. The Agency's Proposal

Seventeen years have passed since the promulgation of § 101.9. During that time, the agency has not only acquired substantial experience under the regulation, but nutrition science has made significant advances. The scientific community now knows much more about the nutritional content of many more foods, and techniques for analyzing foods for their nutrient content have greatly improved. Thus, the primary bases for FDA's reluctance to establish a mandatory nutrition labeling program have been removed.

Perhaps more significantly, nutrition science has established that how people structure their diets is extremely important. Recent evidence has shown that the nutritional content of the total diet has a substantial impact on the health of Americans. For example, according to the Surgeon General's Report, a high intake of dietary fat is associated with increased risk for obesity, some types of cancer, and possibly gall bladder disease (Ref. 1, p. 10). Epidemiological, chemical, and animal studies have pointed to a relationship between saturated fatty acid and cholesterol intakes and increased risk for coronary heart disease (Ref. 1). Moreover, a dietary pattern in which caloric intake is consistent with energy expenditure has been shown to be necessary to achieve and to maintain a desirable body weight (Ref. 1, p. 11).

Individual foods are the building blocks on which the total diet is constructed. Thus, the individual food selections that a person makes in structuring his or her diet, coupled with numerous similar food choices, can have real and significant consequences for the person's health, both in terms of classical nutritional deficiencies and risk of some chronic diseases.

Because the total diet has significant effects on health, FDA believes it is

<sup>1</sup> FDA on at least one occasion since 1973 has made a contrary statement (see, e.g., 46 FR 9924 at 9933 (January 30, 1981)). However, no explanation of the basis for this statement was given, and therefore, the agency is not bound in any way by this statement. In addition, as stated above, the agency has also acknowledged that questions about its authority exist (see 44 FR 75990 at 76001 (December 21, 1979) and 54 FR 32610 at 32612 (August 8, 1989)). For the reasons stated herein, the agency believes that the correct view of its authority is that set forth in this document.

important that consumers have the ability to make informed decisions about the individual food choices they make. To make informed choices, consumers should have access to information on the nutrient content of individual foods. They should have information on the number of calories in a given amount of food and on its total fat and saturated fatty acid content, among other things. (The scientific basis for these and other required nutrients is given in the following section pertaining to the content of the nutrition label.) Without information about these nutrients, FDA believes a consumer cannot adequately judge the consequences of the food selections that he or she makes.

Section 201(n) of the act states that the labeling of a food is misleading if it fails to reveal facts material with respect to consequences that may result from use of the food. Therefore, given the history and use of nutrition labeling, the advances in nutrition science discussed above, and the public interest in healthful diets, FDA concludes that the nutritional content of a food is a material fact, and that a food label is misleading if it fails to bear the nutrition information that would be required under this proposal. To ensure that the labeling of food is not misleading, FDA is proposing to require under sections 201(n), 403(a)(1), and 701(a) of the act, that this information be provided on all foods that are a meaningful source of nutrition. See *Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 618 (1973).<sup>2</sup>

Such a requirement is fully consistent with the policy judgment made by Congress in enacting the act. It is clear that in passing that statute, Congress was interested in ensuring that the food label be informative. The House report on S. 5, the bill that ultimately became the act, stated that section 403 of the act " \* \* \* provide[s] for more informative labeling of foods." H.R. Rept. No. 2139, 75th Cong., 3d Sess. 6 (1938).

Making nutrition labeling mandatory will serve to advance this purpose by ensuring that information directly related to the nature of food, and to how people choose food, is provided on the food label. In *Nutrilab, Inc. v. Schweiker*, 713 F.2d 335, 338 (7th Cir. 1983), the court defined "food" based on the ordinary way most people use food—primarily for taste, aroma, or

nutritive value. Taste and aroma can readily be determined by examining the food itself. Nutritive value cannot. Thus, the proposed regulation would ensure that information that relates to this aspect of food, which is fundamental to people's food choices, is available on the food label.

Courts have consistently upheld agency efforts to provide a more informative food label. In *Federation of Homemakers v. Schmidt*, 539 F.2d 740 (D.C. Cir. 1976), the court upheld an FDA regulation that limited the statutory definition of the term "imitation." During the course of its opinion, the court stated:

This regulation, directed at the laudable aims of encouraging manufacture of nutritional food products and of better informing consumers so that they may exercise a knowledgeable choice of differing foods within general categories lies well within the bounds of discretion which the FDA may exercise. \* \* \*

Id. at 744. See also *American Frozen Foods Institute v. Mathews*, 413 F. Supp. 548, 554 (D.D.C. 1976), aff'd 555 F.2d 1059 D.C. (Cir. 1977), and *National Milk Producers Federation v. Harris*, 653 F.2d 339, 342-43 (8th Cir. 1981).

A regulation that makes nutrition labeling mandatory would clearly serve to better inform consumers. Moreover, it would provide consumers with information that is material with respect to the consequences of consuming a particular food. Therefore, FDA's authority to adopt such a regulation is supported by these cases.

#### D. Conclusion

FDA has acknowledged questions about its authority under the act to require nutrition labeling on all foods. However, given present day knowledge and interest in the foods consumers eat in a daily diet, FDA has moved to resolve these questions. FDA's conclusion is that it has this authority. This conclusion is based on a reasonable and permissible construction of the act in light of the current state of scientific knowledge about nutrition, the relation of nutrition to health, and consumer interest in these matters. Such a requirement is neither arbitrary or capricious nor manifestly contrary to the statute. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, supra, 468 U.S. at 844. In such circumstances, FDA is proposing in § 101.9(a) to require nutrition labeling on all foods that are meaningful sources of calories or nutrients. If the agency adopts this proposal, food that fails to comply with this requirement will be misbranded and subject to regulatory action under the act.

### III. Content of Nutrition Labeling

Current nutrition labeling requirements were established primarily as a result of earlier concerns about nutrient deficiencies and, therefore, have been criticized recently as not sufficiently informative about those nutrients or food components that have been associated with the etiology of certain chronic diseases. To respond to these criticisms, FDA is proposing to revise its nutrition labeling requirements to include these nutrients and food components. On the other hand, while FDA is proposing to expand the number of vitamins and minerals that may be declared, the agency is proposing to make the declaration of most of these vitamins and minerals voluntary, rather than mandatory, because of the lessening of concerns about nutrient deficiencies.

The 10th Edition of the "Recommended Dietary Allowances" (Ref. 5) provides a basis for reexamining current nutrient standards, while a range of reports provides a basis for expanding the required information on the nutrition label to include information on nutrients and food components that is associated with the risk of certain chronic diseases. These reports include, but are not limited to, the "Surgeon General's Report on Nutrition and Health" (Ref. 1); the National Academy of Sciences' report "Diet and Health: Implications for Reducing Chronic Disease Risk" (Ref. 2); the 1985 USDA/DHHS "Dietary Guidelines for Americans" (Ref. 3); the National Cancer Institute's dietary guidelines (Ref. 6); the National Cholesterol Education Program's 1990 "Report of the Expert Panel on Population Strategies for Blood Cholesterol Reduction" (Ref. 7); and a report on the "Physiological Effects and Health Consequences of Dietary Fiber" published in 1987 by the Life Sciences Research Office of the Federation of American Societies for Experimental Biology (Ref. 8). The DHHS draft report "Promoting Health/Preventing Disease, Year 2000 Health Objectives for the Nation" (Ref. 9) is also relevant.

As discussed in a companion document in this issue of the Federal Register, the general conclusion of these reports is that Americans should continue enjoying the generally excellent nutritional quality of the diets available to them, but that they should modify their food consumption habits to form dietary patterns that are associated with the maintenance of good health. These reports place their emphasis on the total diet and not on

<sup>2</sup> Moreover, FDA will continue to consider a food to be misbranded under sections 201(n) and 403(a) of the act, regardless of whether it is a meaningful source of nutrition or subject to the exemptions proposed in this document, if a nutritional claim is made for the food or if a nutrient is added to it, and it does not bear nutrition labeling.

individual foods, supplementation practices, or unnecessary fortification.

These reports make general recommendations about consumption of various nutrients and food components, such as a recommendation to choose foods low in fat and saturated fat. However, specific product information that is available at the time of purchase of foods is necessary if consumers are to be able to make choices that are consistent with these recommendations. Thus, to assist consumers in making appropriate dietary selections, and in response to the large number of written and oral comments suggesting changes in the list of nutrients and food components included in nutrition labeling, FDA is proposing to revise § 101.9(c) to include the nutrients and food components discussed in this document as mandatory or voluntary components in nutrition labeling.

The agency has proposed to make the declaration of a nutrient or food component mandatory in nutrition labeling when quantitative intake recommendations with respect to the nutrient or component are highlighted in the reports cited above (e.g., "Reduce total fat intake to 30% or less of calories." (Ref. 2)), and the nutrient or component is of particular public health significance as defined in several recent consensus documents (Refs. 1, 2, 3, and 7). On the other hand, for those nutrients or food components for which quantitative intake recommendations are not highlighted but that do have some public health significance (e.g., " \* \* \* Increase intakes of starches \* \* \* " (Ref. 2)), or for which quantitative recommendations are available but that are not of pressing public health importance (e.g., the Recommended Dietary Allowances for several vitamins and minerals. (Ref. 5)), the agency is proposing to make declaration of the nutrient or component voluntary. The agency explains the basis for its proposal to make declaration of a particular nutrient or food component mandatory or voluntary in its discussion of that nutrient or food component below.

The agency is concerned about the large number of nutrients and food components that could voluntarily be listed in nutrition labeling and about the way in which their presence on the label may be interpreted by consumers. One of the purposes of this initiative is to simplify the food label, and a long list of nutrients would not seem to advance that purpose. Moreover, the presence of a large number of nutrients could be misinterpreted as implying that a food has a greater public health significance

than is the case. Comments are specifically requested on the merits of allowing a voluntary listing and, if allowed, on whether limitations on the inclusion of these nutrients and food components in nutrition labeling are necessary and on whether the listing of some of the voluntary nutrients would actually be misleading to consumers.

The reports used in developing this nutrition labeling proposal assumed a normal, healthy target population. Consequently, in selecting the nutrients and food components that it is proposing to require on the nutrition label, as well as in deciding whether the declaration of the nutrient or component should be mandatory or voluntary, the agency also assumed that the target population is normal and healthy.

#### A. Calories

FDA is proposing in § 101.9(c)(3) to retain the current requirement for the mandatory declaration of the caloric content of a food. Virtually all dietary guidelines and consensus documents include recommendations to balance energy intake, maintain desirable body weight, avoid obesity, or reduce the prevalence of obesity (Refs. 1 through 3, 6, and 9). Excessive body weight has been linked to the risk of several chronic diseases including cardiovascular diseases, some types of cancer, hypertension, gallbladder disease, and noninsulin dependent diabetes (Refs. 1 through 3, 6, and 9). It also may exacerbate other disease conditions such as osteoarthritis and emphysema (Refs. 1 through 3, 6, and 9). Being too thin has been associated with several conditions, including risk of menstrual irregularities and osteoporosis in women (Refs. 1 through 3, 6, and 9). Specific caloric intake recommendations cannot be issued as part of general dietary guidelines for the public. Rather, the caloric content of the foods ingested by individuals coupled with activity levels and metabolic needs provide the basis for energy balance. Therefore, FDA believes that maintaining the mandatory declaration requirement for calories will continue to help consumers in estimating their total daily caloric intakes and in evaluating the contribution of specific food products to daily caloric goals.

Energy can be expressed in several different ways. For the purpose of simplification, FDA is proposing in § 101.9(c)(3) to use the term "calories" rather than the more precise terms "kilocalories" or "energy." The use of "calories" to mean "kilocalories" or "energy" is commonly accepted in the United States, and FDA considers the use of the term "calories" to be more

readily understood by consumers. To facilitate the harmonization of the declaration of calories with Canada and the European Economic Community, FDA is proposing in § 101.9(c)(3) to allow on a voluntary basis declaration of the number of kilojoules (kJ) in addition to calories and in § 101.9(c)(10)(v), to allow the use of the term "energy" parenthetically as a synonym for calories.

FDA also is proposing in § 101.9(c)(3) to change the wording that describes how the caloric content of foods is to be calculated. Current § 101.9(c)(3) provides for the use of the Atwater method as described in A. L. Merrill and B. K. Watt, "Energy Value of Foods—Basis and Derivation," USDA Handbook 74 (1955) (hereafter referred to as "the Atwater Method") to determine caloric content but erroneously allows for subtraction of nondigestible fiber before calculating calories contributed by the carbohydrate portion of the food. The agency is proposing to correct this error by providing in the regulation that this adjustment is necessary to determine the caloric contribution of carbohydrate when the caloric content is calculated on the basis of 4, 4, 9 calories per gram for protein, carbohydrate, and fat, respectively, and not when the Atwater method is used. This proposed change corrects an error in the current regulation and also makes the calculation more appropriate for the increased use of fiber-rich foods in the U.S. food supply.

Additionally, as macronutrient substitutes or other ingredients such as certain types of gums are approved and added to foods, a significant (20 percent or greater) error in the declaration of the caloric content of the food may occur if there is not a proper accounting of the caloric value of these ingredients. These additives may contribute calories that are not accounted for in the methods that would be used by FDA under this proposal. For these types of food ingredients, manufacturers may be requested to provide evidence that these substances do not contribute to the energy value of the food.

#### B. Calories From Total Fat, Saturated and Unsaturated Fatty Acids, Carbohydrate, and Protein

FDA is proposing in § 101.9(c)(3) to require that when the caloric contributions of the energy nutrients fat, saturated fatty acids, unsaturated fatty acids, carbohydrate, and protein are declared, they be expressed as calories from the nutrient rather than as percent of total calories. While the reports cited above suggest that total fat and

saturated fatty acid intakes be evaluated on the basis of percent of total calories in the total diet, this type of evaluation is not applicable to single foods. For example, in an attempt to meet dietary recommendations for a total day's intake, a consumer might mistakenly apply a percent of calorie recommendation for the day to a particular food (e.g., a food that is very low in fat, where fat content is expressed in grams of fat, but that has a high percent of calories from fat because the total calories contained in the food are low), thereby deciding that, based on the percent of calories from fat in that food, the food should be avoided. In fact, that food may readily fit within a daily diet that meets current dietary recommendations.

Furthermore, by using the information on number of calories, consumers can add the calories from the energy nutrients across the food products that they consume throughout the day. They can use this summed information to calculate the percent of calories from individual energy nutrients in their total diet and the relative contribution of various foods to total dietary fat.

As discussed in section VI.D. of this proposal, FDA intends to develop consumer education materials as part of this food labeling initiative. The concept of using the number of calories from food components will be described in these materials.

#### 1. Calories From Total Fat

FDA is proposing § 101.9(c)(3)(i) to require the declaration of calories contributed by total fat. The most common and consistent dietary recommendation for the general population is for calories from total fat to be reduced to less than or equal to 30 percent of calories (Ref. 6, pp. 676 and 677). To enable consumers to follow this recommendation, FDA is proposing that the number of calories from total fat be listed on the nutrition label.

#### 2. Calories From Saturated and Unsaturated Fatty Acids

The reports cited above have included recommendations that saturated fatty acid intakes be reduced to less than 10 percent of total calories (Refs. 2 and 7). Although these reports do not highlight recommendations for the calories from unsaturated fatty acids, once the dietary goals of less than 30 percent calories from total fat and less than 10 percent of calories from saturated fatty acids are met, the remaining fatty acids (approximately 20 percent of total calories) would, by difference, come from unsaturated fatty acids (Ref. 7). Thus, information on the caloric

contribution from the content of saturated and unsaturated fatty acids declared in the nutrition label may be of interest to consumers. Accordingly, FDA is proposing in § 101.9(c)(3)(ii) to permit the voluntary declaration of the calories from saturated and unsaturated fatty acids.

Recommendations for the caloric contribution of the two major subcomponents of unsaturated fatty acids—polyunsaturated and monounsaturated fatty acids—have been discussed but not highlighted in several reports (Refs. 2 and 7). The conclusions are that calories from polyunsaturated fatty acids should not exceed 10 percent of calories and should preferably be maintained at current average intakes of 7 percent of calories. The remainder of the 20 percent of calories from unsaturated fatty acids would then come from monounsaturated fatty acids. The agency considered allowing declaration of calories from polyunsaturated and monounsaturated fatty acids. However, because the definition of these two types of fatty acids in § 101.9(c)(4)(i) (A) and (B) is limited to the *cis* form, with the *trans* form being excluded, the agency concluded that declaration of calories from these two types of fatty acids would underrepresent their total caloric value and therefore could be misleading to consumers. The agency is, however, requesting comments on whether calories from poly- and monounsaturated fatty acids should be declared, and also whether calories should be based on the total content or only on the *cis*-form of these unsaturated fatty acids.

The caloric contribution of saturated fatty acids can be obtained by multiplying the number of grams of saturated fatty acids given in nutrition labeling by nine (the number of calories in each gram of fat). The caloric value of the unsaturated fatty acids can then be obtained by subtracting saturated fatty acid calories from calories from total fat. If the number of grams of unsaturated fatty acids are declared, the number of calories from unsaturated fatty acids can also be obtained by multiplying that number by nine.

As stated above, FDA intends to develop educational materials on using the number of calories from food components. With this information, consumers will be able to calculate the number of calories from saturated and unsaturated fatty acids from mandatory information on the nutrition label.

#### 3. Calories From Carbohydrate

FDA is proposing in § 101.9(c)(3)(ii)(C) to permit the voluntary declaration of calories from carbohydrate.

The reports cited above have pointed to the need to counterbalance reductions in fat intakes by increasing the consumption of carbohydrate (Refs. 1 and 2). Although quantitative goals are not given in the dietary recommendations, the text of certain of these reports suggest that target intakes for carbohydrate should be 50 to 60 percent or more of total dietary calories (Refs. 1 and 2). FDA believes that information about the caloric contribution of carbohydrates in foods can be useful to consumers trying to replace fat in their diet with carbohydrates and therefore should be permitted in nutrition labeling. Furthermore, FDA intends to advise consumers in the educational materials it prepares that a reasonable estimate of the caloric value of carbohydrates in foods can be obtained by multiplying the carbohydrate content in grams by four, the number of calories in each gram of carbohydrate.

#### 4. Calories From Complex Carbohydrates and Sugars

At this time, there are no general consensus statements concerning the caloric contributions of the principal components of carbohydrate, complex carbohydrates and sugars. Therefore, FDA is not proposing to permit the declaration of calories from these food components. The agency believes this information would not be of any value to consumers.

#### 5. Calories From Protein

Although the dietary guidelines contained in the reports cited above do not provide quantitative recommendations for the percent of total calories from protein, several discuss this issue in their supporting texts (Refs. 2 and 5). Because there are no known benefits, and possibly some risks, in consuming diets with a high animal protein content, it has been recommended that protein intake not be increased to compensate for the caloric loss that would result from the recommended reduction in fat intake (Ref. 2). The reports recommend that protein intakes be maintained at moderate levels, e.g. at levels less than twice the RDA for all age groups.

If fat intake is to be reduced to less than 30 percent of calories, and carbohydrate intake is to be increased to 55 or 60 percent of calories, then by subtraction, one can infer that protein intakes should be maintained at 10 to 15

percent of calories. Because information on calories from protein may thus be useful to consumers in planning total dietary changes, FDA is proposing in § 101.9(c)(3)(ii)(D) to permit voluntary declaration of calories from protein.

#### *C. Amounts of Fat, Fatty Acids, and Cholesterol*

FDA is proposing in § 101.9(c)(4) to retain the current requirement for the declaration of fat in grams and to add, as a mandatory requirement, the amount of saturated fatty acids in grams (§ 101.9(c)(4)(i)) and cholesterol in milligrams (§ 101.9(c)(5)). Presently, declarations of the saturated fatty acids or cholesterol content are mandatory only if nutrition claims are made about either of these compounds.

FDA is proposing to make the amount of fat, saturated fatty acids, and cholesterol mandatory elements of nutrition labeling because virtually all of the reports cited above have recommended that Americans reduce their intakes of total fat as well as their intakes of saturated fatty acids and cholesterol. There is also general agreement on the quantitative intake recommendations for these substances (Ref. 2 and 7), specifically 30 percent of calories, 10 percent of calories, and 300 milligrams (mg) per day, respectively. These recommendations are based on the scientific consensus that high dietary intakes of total fat, saturated fatty acids, and cholesterol are associated with an increased risk of atherosclerotic cardiovascular disease (Ref. 2) most notably with elevations in serum cholesterol and increased risks of coronary heart disease (Refs. 1 and 7). High fat intakes may also be associated with an increased risk of some types of cancer, gallbladder disease, and obesity. Diets low in total fat facilitate reductions in saturated fatty acid intakes and maintenance of desirable body weights. Therefore, inclusion of these food components as mandatory elements of nutrition labeling will assist consumers in meeting these dietary recommendations.

The proposed requirement for declaration of the amount of saturated fatty acids would negate the need for a threshold level for triggering fatty acid declaration as specified in new § 101.9(c)(6)(ii) (see the tentative final rule on cholesterol labeling published elsewhere in this issue of the Federal Register.)

#### *1. Amount of Saturated Fatty Acids*

There is substantial evidence that diets low in saturated fatty acids are associated with decreased levels of blood cholesterol and reduced risk of

coronary heart disease (Refs. 1, 2, and 7), other risks associated with atherosclerotic cardiovascular disease (Refs. 1 and 2), and some forms of cancer (Ref. 2). Diets low in saturated fatty acids may also help to lower total fat intake which is considered important in certain diet and health interrelationships related to cancer and obesity (Ref. 2). Quantitative intake recommendations for saturated fatty acids are common and consistent (Refs. 2 and 7). Therefore, mandatory declaration for this food component is warranted and, if adopted, will be useful to consumers.

FDA is proposing in § 101.9(c)(4)(i) to define saturated fatty acids as the sum of lauric (C12), myristic (C14), palmitic (C16), and stearic (C18) acids. This definition is consistent with the current definition of saturated fatty acids in § 101.25(c)(2)(ii)(B). These four fatty acids also represent most of the saturated fatty acids in the U.S. food supply. Therefore, limiting declaration of saturated fatty acids to C12, C14, C16, and C18, i.e. to carbon chain lengths of 12 through 18, will not result in a significant underrepresentation of saturated fatty acids and calories from saturated fatty acids as consumed in the American diet. Retention of this definition will also avoid the confusion and analytical costs that would result if the definition were changed.

The agency is aware that there is currently evidence that suggests that not all of these four fatty acids have serum cholesterol-raising effects. Nonetheless, the proposed definition, which essentially includes all major sources of saturated fatty acids in the U.S. diet without consideration of their effects on serum cholesterol, is consistent with the dietary guidelines that target total saturated fatty acids intakes at 10 percent or less of calories (Refs. 2 and 7).

On the other hand, there are several concerns that can be raised about this definition, and FDA requests comments on these issues. For example, the exclusion of fatty acids that are shorter in length (i.e., less than C12) could underrepresent to a limited degree the saturated fatty acid content of a few foods with high amounts of dairy fat, such as butter and some cheeses, as well as some hard margarines that contain short chain fatty acids. Also, some fatty acids with chain lengths longer than 18 carbon atoms are contained in confectioneries or may enter the food supply as a result of hydrogenation of newer oil sources such as fish and rapeseed oils. The exclusion of fatty acids with chain lengths of more than 18 carbons could result in an under

representation of the caloric contribution of fatty acid to the diet. However, these longer chain fatty acids are not completely absorbed and thus do not contribute the total number of calories per gram that other fatty acids do. Furthermore, the potential for an atherogenic effect, separate from a serum-cholesterol raising effect, from these fatty acids may be dependent upon the position within the glycerol component of the triglyceride to which the longer chain fatty acid is attached.

Additionally, because there is now general consensus that the serum cholesterol-raising saturated fatty acids are primarily myristic (C14) and palmitic (C16) and to a lesser extent lauric (C12) acids, the proposed definition, which includes stearic acid (C18) in addition to the C12 to C16 fatty acids, includes saturated fatty acids for which there is not clear evidence of risk relative to serum cholesterol. Conversely, atherosclerotic diseases are multifactorial, and risk factors other than serum cholesterol may need to be considered. Risk factors such as thrombosis and platelet reactivity, which can be complicating concerns in some individuals with some types of atherosclerotic disease, may be affected by the longer chain fatty acids (C18 and above). Although the evidence is very preliminary at this time, other chronic diseases, including some types of cancer, may also be adversely associated with high intakes of saturated fatty acids (Ref. 2). Given these complications and conflicting issues, FDA specifically requests comments on the question of what fatty acids should be considered as saturated fatty acids, and on what basis these decisions should be made.

#### *2. Amount of Unsaturated Fatty Acids*

While none of the reports cited above has specifically addressed unsaturated fatty acid intakes in its recommendations, supporting text in several of the reports (Refs. 2 and 7) has noted the likelihood of reducing the risk for coronary heart disease (Ref. 7) and atherosclerotic cardiovascular disease (Ref. 2) when unsaturated fatty acids are substituted for saturated fatty acids in the diet. While FDA believes that mandatory declaration of unsaturated fatty acids is not warranted at this time, information on unsaturated fatty acids may be useful to some consumers. Also, information on levels of unsaturated fatty acids in a food could assist consumers in monitoring their intakes of various types of fat throughout the day.

FDA is therefore proposing in § 101.9(c)(4)(ii) to permit the voluntary

declaration of the quantitative amount of unsaturated fatty acids in grams present in a serving. FDA is proposing to make declaration of unsaturated fatty acid content mandatory if claims are made about fatty acid or cholesterol content, or if the manufacturer voluntarily chooses to declare calories from unsaturated fatty acids.

FDA is also proposing the use of the collective term "unsaturated fatty acids" to present content information for the two types of unsaturated fatty acids, polyunsaturated and monounsaturated fatty acids, instead of requiring separate declarations of each of these two types of unsaturated fatty acids. The use of this collective term will simplify the presentation of information for consumers and will allow manufacturers to conserve space on a crowded label. It should not result in a loss of meaningful information to consumers because both polyunsaturated and monounsaturated fatty acids are associated with reduction of cardiovascular risk factors when they replace saturated fatty acids in diets. Also, because the definition of unsaturated fatty acids will include all unsaturated fatty acid isomers (*i.e.*, *cis* and *trans* isomers, see below) rather than specific isomers of the unsaturated fatty acids, it provides an appropriate basis for the voluntary declaration of calories from unsaturated fatty acids. Further, it will allow manufacturers flexibility in substituting oil ingredients with similar ratios of saturated to unsaturated fatty acids because differences in proportions of polyunsaturated and monounsaturated fatty acids in these various oils will not preclude their substitution. Its major disadvantage is that consumers cannot monitor the amount of polyunsaturated fatty acids in their diets in order to maintain intakes at less than 10 percent of calories as discussed in several reports (Refs. 2 and 7).

### 3. Amounts of Polyunsaturated and Monounsaturated Fatty Acids

As an alternative to using the collective term "unsaturated fatty acids," FDA is proposing in § 101.9(c)(4)(ii) to permit manufacturers to voluntarily list the amounts of polyunsaturated and monounsaturated fatty acids. However, if label claims are made about polyunsaturated or monounsaturated fatty acids, § 101.9(c)(4)(ii) would require that the amounts of these fatty acids be listed. If a manufacturer chooses to list polyunsaturated or monounsaturated fatty acids, or if the declaration is required because of a label claim, under this proposal, both polyunsaturated and monounsaturated fatty acids will have

to be declared so that complete information on unsaturated fatty acids will be provided.

When polyunsaturated and monounsaturated fatty acids are declared, FDA is proposing, in § 101.9(c)(4)(ii) (A) and (B), to limit these fatty acids to *cis*, *cis*-methylene-interrupted polyunsaturated fatty acids and the *cis*-monounsaturated fatty acids. It is proposing to exclude the *trans* isomers. Thus, the definition for polyunsaturated and monounsaturated fatty acids is less inclusive than the definition for unsaturated fatty acids which includes both *cis* and *trans* isomers.

FDA believes that the more limited definition for polyunsaturated and monounsaturated fatty acids is appropriate because declarations concerning polyunsaturated and monounsaturated fatty acids are at a level of specificity associated with targeted diet and health interrelationships. FDA believes that when this level of specificity is used in label declarations, the definition of terms should correspond as accurately as possible to the science for which there is consensus. The evidence for the role of polyunsaturated fatty acids in reducing serum cholesterol levels is strongest for the *cis* isomers (Ref. 2). Additionally, for consistency and because polyunsaturated and monounsaturated fatty acids are to be declared together, FDA is proposing to limit declarations of the monounsaturated fatty acids to the *cis*-isomer. The disadvantage of limiting the poly- and monounsaturated fatty acid content to their *cis* form is that declaration of calories from these components would underrepresent their total calorie contribution. Separate declaration of polyunsaturated fatty acids may also be erroneously viewed by consumers as "more is better," whereas dietary recommendations are for intakes (7 to 10 percent of calories) to fall within a fairly narrow range (Refs. 2 and 7). This range reflects the benefits of intakes of polyunsaturated fatty acids on lowering of serum cholesterol levels while minimizing the potential for increased risks of some types of cancer.

### 4. Amount of Trans Isomers of Fatty Acids

The agency has received comments suggesting that *trans* isomers of fatty acids behave similarly in the diet to saturated fatty acids in that they are associated with increased serum cholesterol levels, and that therefore the agency should require that levels of *trans* fatty acids be declared as

a separate entity on the nutrition label. FDA believes there is no basis for a separate declaration of *trans* fatty acid content. A recent consensus report (Ref. 2) noted that current evidence does not support a serum cholesterol-raising effect for *trans* isomers, when they are substituted for saturated fatty acids in the diet. Therefore, the agency tentatively concludes that there is no basis for declaring *trans* isomers on the nutrition label.

Given the above described complications and conflicting issues related to definitions and uses of the collective term unsaturated fatty acids versus the specific subcomponents of poly- and monounsaturated fatty acids, FDA specifically requests comments on the various issues associated with declaration of fatty acid content.

### 5. Amount of Cholesterol

FDA is proposing in § 101.9(c)(5) to require the declaration of cholesterol content and to require that it be declared in milligrams. The proposed requirement that cholesterol be declared represents a change from the current voluntary regulatory provisions. Virtually all recent reports that include a review of the relationship of diet to risk of heart disease have recommended that Americans consume less than 300 milligrams (mg) of cholesterol daily (Refs. 2 and 7). These recommendations are based on the convincing body of evidence that diets low in saturated fatty acids and cholesterol are associated with low risks and rates of coronary heart disease. Given the scientific consensus on the benefits of reducing dietary cholesterol intakes as well as the availability of quantitative intake recommendations, the agency tentatively concludes that mandatory declaration of cholesterol content of foods is warranted. The information should be of use to consumers in their efforts to monitor their intake of cholesterol.

### D. Amount of Carbohydrate, Complex Carbohydrate, Dietary Fiber, Sugars and Sugar Alcohols

A number of recent reports advise Americans to increase their consumption of carbohydrate, particularly complex carbohydrate and dietary fiber (Refs. 1 through 3, and 6 through 9). Moderation in consumption of "refined" sugars is also recommended (Refs. 1 and 3). Other reports focus on foods that are good sources of complex carbohydrates and fiber by recommending that intakes of fruits and vegetables, whole grain breads and cereals, and legumes be increased (Refs.

1 and 6). These foods tend to be lower in total fat, saturated fatty acids, and cholesterol, and thus, their increased consumption in place of foods containing more of those fat components is considered an important aspect of decreasing the risk of cardiovascular disease. Replacement of dietary fats with complex carbohydrate may also facilitate maintenance of desirable weight and prevention of obesity because carbohydrates contribute only four calories per gram as compared to nine calories per gram from fat, and dietary fibers contribute no, or very limited, calories. Persons who consume diets high in complex carbohydrate also tend to have lower rates of diverticulosis and decreased risks of some types of cancer and noninsulin-dependent diabetes, although the components of complex carbohydrates that are responsible for these correlations are not known (Ref. 2).

#### 1. Amount of Carbohydrate

FDA is proposing in § 101.9(c)(6) to retain the requirements that declaration of carbohydrate content be a mandatory element of the nutrition label, and that it be declared in grams. There is a general consensus that Americans should increase their consumption of carbohydrate, particularly complex carbohydrate, to help persons meet dietary goals for reducing fat intakes (Refs. 1, 2). Therefore, quantitative information on carbohydrate content will be useful to consumers. Furthermore, while quantitative recommendations for the intake of carbohydrate have not been established, declaration of the amount of carbohydrate in a food will allow consumers to determine the percentage of calories from carbohydrate.

FDA is proposing to change the definition of "carbohydrate" to exclude dietary fiber, that is, to exclude the component of carbohydrate previously known as "nondigestible" fiber. Because dietary fiber includes the components of carbohydrate that cannot be digested by humans, the proposed definition of carbohydrate no longer includes components of carbohydrate that generally do not contribute calories to the diet. Thus, the proposed definition encompasses only the metabolizable energy of carbohydrate. FDA believes that it would be potentially confusing to require a declaration of dietary fiber content and to also allow the inclusion of dietary fiber as part of the carbohydrate declaration.

#### 2. Amount of Complex Carbohydrate

FDA is proposing in § 101.9(c)(6)(i) to permit the voluntary declaration of the

complex carbohydrate content because recent dietary reports have discussed the need to increase consumption of complex carbohydrates (Refs. 1 to 3). Because recommendations to increase consumption of complex carbohydrates have not been quantified, however, the agency finds that a basis for requiring declaration of this food component in the nutrition label has not been established.

The term "complex carbohydrate" is used in most of the recent reports on diet and health, but the term has not been clearly or consistently defined. The agency wishes to provide a definition for "complex carbohydrate" that is consistent with the physiological effects attributed to complex carbohydrate in the various consensus reports. However, these reports have not chemically defined complex carbohydrate, and there is not currently an established, specific chemical definition for this term. Therefore, for regulatory purposes, FDA proposes that "complex carbohydrate" be defined as the sum of dextrins and starches. Thus, complex carbohydrate, as defined, includes those carbohydrate components that contain 10 or more saccharide units (exclusive of dietary fiber).

FDA is aware that including dextrins within the definition of "complex carbohydrate" may result in the classification of certain components of a few nutritive sweeteners as complex carbohydrates. The agency, therefore, requests comments on this proposed definition and solicits suggestions for alternative definitions of "complex carbohydrate."

#### 3. Amounts of Sugars and Sugar Alcohol

Several recent dietary guidelines recommend that intakes of sugars and sugar-rich foods be limited (Refs. 1, 3). Under certain conditions, sugars are associated with dental caries, particularly in children.

Although moderation in use of sugars is recommended in several reports, FDA is not proposing to require the mandatory declaration of sugars content because specific quantitative recommendations have not been provided. FDA is proposing in § 101.9(c)(6)(ii)(A) to permit the voluntary declaration of sugars content unless a claim is made with respect to this food component, in which case it becomes a mandatory declaration. However, in response to consumer interest as evidenced in comments to the ANPRM and at the public hearings, the agency is requesting specific comment on whether sugars content declaration should be mandatory, as

well as the rationale for such a requirement.

a. *Definitions of sugars.* FDA is proposing in § 101.9(c)(6)(ii)(A) to define "sugars" as the sum of all free mono- and oligosaccharides (and their derivatives) that contain four or fewer saccharide units. The common definition of sugars is usually limited to mono- and disaccharides (i.e., those that contain two or fewer saccharide units), but FDA is now proposing to expand the definition to include tri- and tetrasaccharides. These latter components have sweetening, nutritional, and metabolic effects similar to the mono- and disaccharides, although they are somewhat less sweet tasting. Furthermore, corn syrups, which are commonly used in many foods, contain varying amounts of tri- and tetrasaccharides. Thus, considering the widespread use of corn syrups in the U.S. food supply, exclusion of tri- and tetrasaccharides from the definition of sugars could result in a substantial under declaration of the sugars content of foods. For this reason, the agency is proposing to include oligosaccharides containing four or fewer saccharide units in the definition of sugars.

FDA is also proposing to include sugar alcohols within the proposed definition of "sugars" (§ 101.9(c)(6)(ii)(A)). Some sugar alcohols have sweetening, nutritional, and metabolic effects similar to sugars. Although sugar alcohols do not fall within the strict chemical definition of carbohydrates, their biochemistry is sufficiently similar to that of sugars that they are usually classified under, or considered with, carbohydrates, specifically sugars (Ref. 10). Metabolically, sugar alcohols behave as carbohydrates, although their absorption is slower and less complete than that of glucose (Ref. 11). Moreover, the current FDA regulation on diet beverages has defined sugar alcohols as carbohydrates, implying that sugar alcohols are sugars.

Considering the precedent relative to diet beverages and the fact that, biochemically, sugar alcohols behave like sugars and are used as nutritive sweeteners in foods, FDA is proposing to include the sugar alcohols in the definition of "sugars" for labeling purposes.

b. *Sugar alcohols.* Although sugar alcohols are included in the definition of sugars, FDA is proposing in § 101.9(c)(6)(ii)(B) to allow, on a voluntary basis, separate declaration of sugar alcohols. Under the proposal, declaration would become mandatory if claims are made relative to sugar

alcohols or to sugars when sugar alcohols are present.

Sugar alcohols may have particular health benefits. For example, some have low cariogenicity relative to sucrose. Others are useful in dietetic meal plans. Separate declaration could thus be useful for persons who wish to selectively choose foods containing sugar alcohols.

**c. Total sugars versus added sugars.** Although some comments suggested that nutrition labeling of "added" sugars content should be required, the agency is proposing in § 101.9(c)(6)(ii)(A) that the declared content be limited to total sugars and thus is not proposing to permit the separate labeling of "added" sugars. There is no scientific evidence that the body makes any physiological distinction between added sugar molecules and those naturally occurring in a food.

The agency is aware that, in many instances, foods containing naturally occurring sugars may contain other nutrients as well and, in some instances, are considered to be preferable to foods containing added sugars. With mandatory nutrition labeling, however, consumers should be able to differentiate between sugar-containing foods with high versus low nutrient value.

Furthermore, declaration of only added sugars may significantly underrepresent the sugars content of many foods that are high in naturally occurring sugars. For example, pineapple canned in heavy syrup contains about 17 grams of mono and disaccharides per 100 grams of food. Of this, only about 50 percent comes from added sources. For these reasons, a declaration of only added sugars could be misleading, and therefore the agency is not proposing to permit it.

**d. Analytical methodologies for sugars.** Several different analytical methods are listed in the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC) for determining the amount of mono- and disaccharides in foods. The AOAC official methods list some gas liquid chromatography (GLC) methods for the determination of sorbitol, but none are listed for the determination of xylitol and mannitol. In addition, there are no collaboratively studied analytical methods for the determination of glucose polymers higher than two saccharide units.

FDA believes that the most appropriate methodology currently available for determining the levels of mono- and disaccharides is the high performance liquid chromatography (HPLC) procedure. Therefore, in

monitoring compliance with label statements concerning sugars content, the agency will use the HPLC procedure. However, the agency realizes that HPLC methods still need to be developed for certain sugars and sugar alcohols for a broad spectrum of foods, and that these methods need to be collaboratively studied by AOAC chemists. The agency believes that the lack of the collaboratively studied methodology should not be a limiting factor for nutrition labeling of sugars. The food industry is free to use any reliable and appropriate method it chooses to determine levels of these food components if the appropriateness of the method can be documented. The food industry should, however, understand that FDA will determine compliance by the HPLC method.

#### 4. Amount of Dietary Fiber

FDA is proposing in § 101.9(c)(6)(iii) to require the declaration of total dietary fiber content. The benefits of dietary fiber for normal bowel function are well defined. There is also some evidence suggesting that high intakes of fiber-rich foods may be associated with reduced rates of several chronic diseases and risk factors including some types of cancer, high blood cholesterol, non-insulin dependent diabetes, diverticulosis, hypertension, and gallstones. However, at this time, the most substantive evidence centers on fiber's role in bowel function.

A recent report (Ref. 8) recommended an intake range for dietary fiber, for healthy adults. This range was 20 and 35 grams per day and is in agreement with the recommendation of the National Cancer Institute (Ref. 6). Therefore, because of the well-documented role of dietary fiber in maintaining normal bowel function and the existence of a quantitative goal for daily intakes, FDA is proposing that declaration of dietary fiber be mandatory.

**a. Soluble and insoluble dietary fibers.** Dietary fiber comprises a very heterogeneous group of components. Different fiber sources and processing methods produce fibers differing greatly in composition and physical/chemical properties. As a result, different fibers often have quite different physiological effects.

The available analytical methods are generally poor predictors of the physiological effects of various dietary fibers. However, in some cases, classification of fibers as soluble and insoluble is useful in describing their physiological characteristics and effects. In general, soluble fibers include gums, pectins, mucilages, and some hemicelluloses. Insoluble fibers

generally include cellulose, lignin, and other hemicelluloses.

Diets high in insoluble fibers are associated with the maintenance of normal bowel function (Ref. 8). There is also some evidence that insoluble fibers may relieve symptoms of uncomplicated diverticulosis and reduce the risk of colon cancer (Refs. 1, 2, and 8). Although the scientific evidence is equivocal, diets containing foods high in soluble fiber have been associated with decreases in serum cholesterol levels and with improved glycemic control and decreased insulin requirements in diabetes (Refs. 1, 2, and 8).

Different physiological effects are therefore associated with these two types of dietary fiber, and consumers have expressed interest in knowing the amounts of these types of fiber in foods. However, no quantitative guidelines for daily intakes of soluble and insoluble fiber components have been provided. Thus, FDA is proposing in § 101.9(c)(6)(iii)(A) to permit the voluntary declaration of insoluble and soluble fiber components, unless a claim for either fiber content is made, in which case declaration would be required. If one fiber component is declared, FDA is proposing that for completeness both must be declared.

**b. Methods of analysis for dietary fibers.** Fiber content for food labeling purposes traditionally has been measured and declared as crude fiber. More recently, however, crude fiber has proven to be an inadequate measure for predicting physiological effects from fiber consumption. Moreover, crude fiber significantly and inconsistently underestimates total dietary fiber. Consequently, clinical studies have focused on methods of analysis that measure total dietary fiber and its soluble and insoluble fiber subcomponents.

The method that FDA is proposing in § 101.9(c)(6)(iii)(B) to require for use in measuring total dietary fiber and its components is discussed in "Determination of Insoluble, Soluble, and Total Dietary Fiber in Foods and Food Products:

Interlaboratory Study," in the Journal of the Association of Official Analytical Chemists, 71:1017, 1988. This method is a modification of earlier methods and has undergone final action by the Association of Official Analytical Chemists for total dietary fiber. A paper describing the collaborative study for insoluble and soluble dietary fiber components is now being considered by the AOAC. This method measures total dietary fiber and insoluble dietary fiber. Until such time as a method for an

independent soluble dietary fiber is approved, soluble dietary fiber will be measured by subtracting the amount of insoluble fiber from the amount of total dietary fiber.

*c. Petitions relating to dietary fiber.* FDA has received two petitions that have raised issues that are germane to this proposed action regarding the label declaration of dietary fiber. The two petitions are from the Kellogg Company dated May 14, 1978 (Docket No. 78P-0091) and the Center for Science in the Public Interest dated June 1, 1987 (Docket No. 87P-0194/CP). The agency is responding to these two petitions in this rulemaking.

## E. Protein

### 1. Quantitative Protein Content

In general, recommendations concerning protein intake have not been featured in dietary reports (Refs. 1 and 3), although the "Diet and Health" stated that protein intake should be maintained at moderate levels (Ref. 2). The supporting texts in some documents suggest, however, that it is prudent to avoid high levels of protein intake because concerns have been raised about habitually high intakes of protein and the potential association between such intakes and the risk of certain chronic diseases, such as osteoporosis and renal diseases (Refs. 2 and 5). Nonetheless, no firm consensus exists relative to the role of protein intake in the etiology of any chronic disease condition.

The current edition of the NAS/NRC report "Recommended Dietary Allowances" (Ref. 5) states that the typical U.S. diet includes protein from many different sources, and that that protein is of high quality and meets the requirements (as determined by the amino acid pattern and digestibility of the diet) of all age groups except infants. Even though this report indicates that protein intakes are generally adequate, the agency proposes in § 101.9(c)(7) that the declaration of protein content (as number of grams of protein per serving) should continue to be required as a mandatory declaration within nutrition labeling. The agency is proposing to maintain this requirement because of the critical importance of protein in maintaining good health because it supplies essential amino acids, and because protein, along with fat and carbohydrate, is a principal source of calories. Also, for certain subpopulations, such as infants, who rely on relatively few foods as their source of nutrients, the level and quality of the protein present in a food is an

important consideration in food selection.

In addition, the agency is proposing in § 101.9(c)(7) to maintain the requirements in current § 101.9(c)(7)(ii)(b) and § 101.9(h)(1)(iv) that the label for any food contain the statement "not a significant source of protein" immediately adjacent to the protein content regardless of the actual amount of protein present if the food is: (1) intended for adults and children 4 or more years of age and has a protein quality value less than 20 percent of the casein value, or (2) intended for children less than 4 years of age and has a protein quality value less than 40 percent of the casein value. The agency is proposing to retain this requirement because there is still a need to provide protection for the consumer, especially the young child, from inadequate nutrition resulting from the indiscriminate use of poor quality proteins.

### 2. Protein Content as a Percentage of the RDI

Because current evidence suggests that the diet typically consumed within the U.S. provides for an adequate intake of protein of sufficiently high biological quality, FDA is proposing in § 101.9(c)(7)(i) that declaration of protein content calculated as a percent of the RDI be voluntary for foods intended for consumption by adults and children 4 or more years of age, unless a protein claim is made for the food. However, the agency also is proposing in § 101.9(c)(7)(i) that nutrition labeling on foods intended for infants and children less than 4 years of age continue to contain a mandatory statement of protein content expressed as a percent of the RDI. The agency tentatively considers this action to be warranted because of the importance of the quality of protein in diets derived from a limited number of foods, as is the case for infants and young children.

The proposal to make declaration of percent RDI for protein for foods intended for consumption by persons 4 or more years of age voluntary would be a change from current labeling requirements for protein. The agency is proposing this change based on evidence that protein intakes for this population group in the U.S. are generally more than adequate and not a public health concern. Moreover, if this change is adopted, space will be made available on the label for information on food components that are associated with more pressing health concerns. As described above, consumers interested in nutrition information on protein will

still find the quantitative amounts of protein listed on the label.

The NAS/NRC RDA report (Ref. 5) and the Joint Food and Agriculture Organization/World Health Organization/United Nations University Expert Consultation (Ref. 12) advise that adjustments in protein intakes according to the differing protein quality values of foods may be necessary for infants and preschool children with exceptional dietary patterns. The reason for such adjustments is that food proteins differ in their capacities to meet protein needs. Both protein quantity and quality are major factors in the utilization of protein. Based on these facts, the agency tentatively concludes that the use of a protein quality component in expressing the percent RDI would be in the best interest of infants and children.

For labeling purposes, the agency is therefore proposing to retain casein as the standard in expressing the percentage of the RDI. However, the agency is proposing that the separation of protein allowances according to protein quality values, as found in current §§ 101.9(c)(7)(ii)(a) and 101.9(h)(1)(iii), be eliminated. This concept is no longer used by the NAS/NRC in determining the RDA for protein (Ref. 5). In addition, FDA believes that current requirements in § 101.9(c)(7)(ii)(a) and (b) and § 101.9(h)(1)(iii) and (iv) requiring Protein Efficiency Ratio (PER) studies inhibit flexibility in determining protein quality by alternative methodologies. Research is continuing to develop new methodologies for the routine evaluation of protein quality. At least one international organization, the Codex Alimentarius Commission, is in the process of evaluating the appropriateness of various methods for assessing the protein quality of foods and making recommendations on suitable methodologies and the need for further research.

As new methodologies and new information on amino acid requirements of various age groups become available, the agency believes it must become more flexible in regard to permitted protein quality methodologies. Therefore, while the PER method described in the Official Methods of Analysis of the Association of Official Analytical Chemists may continue to be used as one of the methods for assessing the protein quality of foods, alternative acceptable validated procedures may be used as they become available.

Accordingly, FDA is proposing in § 101.9(c)(7)(i) that whenever a statement of protein content as a percentage of the RDI is given, it shall be calculated using a corrected amount

of protein. Proposed § 101.9(c)(7)(ii) defines "corrected amount of protein" as the actual amount of protein (in grams) per serving multiplied by the relative protein quality value. The relative protein quality value of a food is determined by dividing the food's protein quality value by the protein quality value for casein. If the food's protein quality value is equal to or greater than the protein quality value of casein, the agency is proposing that the relative value be set at 1.

The RDI's for protein are given in proposed § 101.9(c)(7)(iii) which is found in a companion document entitled "Food Labeling: Reference Daily Intakes and Daily Reference Values," appearing elsewhere in this issue of the Federal Register.

When the percent of RDI for protein is declared, FDA is proposing in § 101.9(c)(7)(i) that this information be placed adjacent to the declaration of the quantitative amount of protein and expressed as "Percent of Daily Value." This change is being proposed to consolidate the information on protein as well as to conserve space on the label. Use of the new terminology "Percent of Daily Value" is discussed below under "Vitamins and Minerals."

#### F. Amount of Sodium

The agency is proposing in § 101.9(c)(8) to retain the current requirement for the mandatory declaration of sodium content in milligrams. Comments that the agency has received strongly support the continued inclusion of sodium in nutrition labeling. According to the FDA's 1988 Diet and Health Survey (Ref. 13), sodium remains the most commonly mentioned component that consumers try to avoid in their diet. Moreover, the recent National Food Processors Association survey on food labeling (Ref. 14) reported that 88 percent of shoppers felt label information on sodium was either very or somewhat important.

Many of the reports from government agencies and consensus groups include dietary recommendations on the need to restrict or reduce the dietary intake of salt (sodium chloride) and, more specifically, the intake of sodium (Refs. 1 through 3 and 9). These recommendations range from quantitative intake levels to general statements about avoiding excessive levels of sodium. The recommendations are based on epidemiological evidence indicating that, on a population basis, elevated blood pressure is associated with diets containing high levels of salt (Refs. 1 and 2). High blood pressure, or primary hypertension, is a major risk

factor for cardiovascular disease. While there is also some evidence that salt intake may be associated with stomach cancer (Ref. 2), these data are equivocal, and the major public health concern centers on the development of hypertension.

The scientific community considers it likely that susceptibility to sodium-induced hypertension (i.e., salt sensitivity) is genetically determined (Ref. 2). However, no reliable marker has been developed, and valid estimates concerning the number of persons at risk cannot be made. Therefore, because salt sensitive persons cannot be identified, FDA believes that it is prudent to recommend caution concerning sodium intake for the general population, especially because currently recommended levels of sodium intake are not known to pose detrimental effects to those who are not salt sensitive. Consequently, because of the concern for risk of essential hypertension and consumers' interest in the sodium content of foods, FDA is proposing that the declaration of sodium content remain mandatory.

#### G. Amount of Potassium

FDA is proposing in § 101.9(c)(9) to continue to permit the voluntary declaration of the amount of potassium in milligrams. The beneficial effects of potassium intake relative to mortality from stroke have been noted in a recent report (Ref. 2). Data from animal studies suggest that dietary potassium may lower blood pressure (a risk for heart disease) and also protect against vascular damage and stroke (Ref. 2). Epidemiological evidence for humans indicates that diets with high levels of potassium—but also low levels of sodium—may be beneficial in lowering blood pressure (Ref. 2).

Most reports do not make recommendations concerning potassium intakes. Supporting texts state that the current research findings tend to be inconclusive and contradictory (Refs. 1 and 2). Although consumer interest in this information as well as research trends suggesting its importance relative to chronic disease conditions support the potential usefulness of this information, FDA's tentative view is that the nature of current research findings does not justify making declaration of the potassium content of a food a mandatory element of nutrition labeling. FDA will continue to review relevant information on this subject and may deem it appropriate to require potassium labeling in the future.

#### H. Amounts of Vitamins and Minerals

FDA is proposing in § 101.9(c)(10)(ii) to retain the current requirement that vitamin A, vitamin C, calcium, and iron be declared in the nutrition label, and that they be declared as a percent of the RDI (currently the U.S. RDA). This proposal is based on continuing public health concerns relative to inadequate dietary intakes of these nutrients by specific portions of the population, as well as the possible association between several of these nutrients and the risk of chronic disease.

The agency also is proposing in § 101.9(c)(10) to retain the current requirement for the presentation of this information as a percentage of the reference standard (i.e., RDI) rather than as a quantitative amount, such as grams or milligrams. However, in response to comments stating that the use of the current terminology "Percentage of the U.S. RDA" on the label is meaningless or confusing to consumers, FDA is proposing in § 101.9(c)(10) to use simpler terminology, namely "Percent of Daily Value," to head the list of vitamins and minerals.

FDA believes it is beneficial to have a general term, such as "Daily Value," that can apply to both types of reference standards, RDI's and DRV's (discussed below under section XI "Nutrition Profile"), so that consumers are not confused by the listing of two different sets of values. While § 101.9(c)(10), if adopted, will continue to specify that amounts of vitamins and minerals are to be expressed as a percent of the RDI, the agency believes that the declaration on food labels does not require such specificity. The agency requests comments on this view and solicits suggestions for a single term that can be used on the label to represent both RDI's and DRV's.

In the companion document appearing elsewhere in this issue of the Federal Register that addresses RDI's of vitamins and minerals, the agency is proposing § 101.9(c)(10)(iv), which contains RDI's for five groups: infants, children less than 4 years of age, adults and children 4 or more years of age, pregnant women, and lactating women. FDA is proposing that the RDI's for all five groups be published under § 101.9(c), so that when manufacturers formulate food specifically for infants or for children under 4 years of age, pregnant women, or lactating women, they will have current reference standards applicable for the intended age group available for use in preparing nutrition labeling for the food. FDA is proposing in § 101.9(c)(10)(i) to specify

that the percent RDI declared shall be based on the RDI for the group for which the food is represented.

FDA is also proposing to move current § 101.9(h)(1)(ii), which provides for the dual declaration of percent U.S. RDA for foods represented or intended for use by both infants and children under 4 years of age, to § 101.9(c)(10)(i), in order to group all references to declaration of percent RDI together.

#### 1. Vitamin A

FDA is proposing in § 101.9(c)(10)(ii) to retain the current requirement for the mandatory declaration of vitamin A. Historically, vitamin A has been a nutrient of concern because it is found in a relatively limited number of foods within the food supply, and these foods must be selectively chosen by consumers on a regular basis. Therefore, fortification of selected foods, such as milk, has been allowed so as to ensure adequate intakes of this vitamin among healthy persons consuming a balanced diet.

More recently, vitamin A has received attention relative to its possible role in preventing, suppressing, or retarding some cancers (Refs. 1, 2, 5, and 6). The available research is not conclusive because many of the studies have focused on foods with vitamin A activity and do not distinguish between the carotenoid and retinol components. Thus, both the form and actual effect of vitamin A relative to a possible risk of cancer needs to be clarified.

However, information about the vitamin A content of foods is important to consumers because the limited number of foods rich in vitamin A requires selective choices by consumers. Accordingly, the agency proposes to continue the mandatory declaration of this nutrient in nutrition labeling.

#### 2. Vitamin C

FDA is proposing in § 101.9(c)(10)(ii) to retain the current requirement for the mandatory declaration of vitamin C. The agency is doing so for several reasons. First, while certain fortification efforts and the greater year-round availability of citrus fruits and dark green vegetables have virtually eliminated the incidence of widespread dietary deficiencies of vitamin C, certain subpopulations are still considered at risk (Refs. 2 and 5). These groups include the elderly, alcoholics, and cigarette smokers, although research concerning vitamin C status among persons in these groups is equivocal.

Also of interest from a public health perspective is the role that vitamin C may play in promoting the intestinal absorption of nonheme iron. With

vitamin C in the meal simultaneously with iron, vitamin C can help to prevent iron deficiency anemia (Refs. 2 and 5). On the other hand, in persons at risk of iron overload, particularly hemochromatotics, vitamin C may increase the risk of excessive iron absorption.

Additionally, several reports have highlighted the possible role of vitamin C in reducing the risk of cancer (Refs. 1, 2, and 6). However, the evidence linking vitamin C with reduced cancer risk is considered indirect because it is based on estimations of the consumption of foods known to contain high or low concentrations of the vitamin rather than on a measure of actual vitamin C intake. Therefore, the association between vitamin C and cancer is currently unclear.

FDA tentatively concludes that based on the well established role that vitamin C plays in nonheme iron absorption, Vitamin C should remain a mandatory element of nutrition labeling. Consumers at risk of iron deficiency can benefit by increasing their consumption of vitamin C-rich foods, and those at risk of iron overload can decrease their use of these foods.

#### 3. Calcium

FDA is proposing in § 101.9(c)(10)(ii) to retain the current requirement for the mandatory declaration of the calcium content of foods. The agency is proposing to do so based primarily on (1) the limited number of calcium-rich foods in the U.S. food supply, requiring careful selection by consumers to meet their calcium goals, (2) current concerns that calcium intakes in the United States are generally marginal, and (3) evidence that adequate calcium intakes are needed to allow for optimal bone mass development during childhood and young adulthood, which in turn may reduce the risk for osteoporosis.

Several of the reports offering dietary guidelines specify the need to maintain an adequate calcium intake throughout life and particularly target the need for adolescent females and young women to increase their intakes of calcium-rich foods (Refs. 1, 2, 5, and 9). Because of evidence suggesting that dietary intakes of calcium among adolescent girls and young women as well as elderly men are less than adequate, national nutrition goals for the year 2000 highlight the need to increase the consumption of calcium-rich foods among persons over 11 years of age (Ref. 9). Therefore, FDA is proposing to keep calcium as a mandatory element of nutrition labeling.

#### 4. Iron

Iron deficiency remains a risk for certain segments of the U.S. population, notably among young children, adolescents, and women of childbearing age (Refs. 1, 2, and 5). Pregnant women, especially those with low incomes, are also a group at risk. For women of childbearing age, inadequate intakes of dietary iron are responsible for the most prevalent form of iron deficiency in the United States (Ref. 1). While there has been some research on the role of iron nutrition—both inadequate and excessive intakes—in the development of certain cancers, the available evidence is considered weak and inconclusive (Ref. 2).

Thus, public health concerns relative to iron currently center on the prevention of iron deficiency among women of childbearing age. The national nutrition goals for the Year 2000 specify the reduction of iron deficiency among children 1 to 2 years, women 20 to 44 years, and low-income pregnant women and recommend increased dietary intake of iron (Ref. 9). For these reasons, FDA is proposing in § 101.9(c)(10)(ii) to retain the current requirement for the mandatory declaration of the iron content of foods. Iron is widely distributed in foods but because the usual diet provides only 6 to 7 mg of iron per 1,000 calories, persons consuming relatively few calories, such as women and children, may need to make careful food choices so as to meet iron needs within caloric restrictions.

#### 5. Thiamin, Riboflavin, and Niacin

FDA is proposing to change the current requirement that thiamin, riboflavin, and niacin content be declared and to make their declaration voluntary. If this proposal is adopted, these nutrients would only have to be included in the nutrition label if they are added as nutrient supplements or if a claim is made for them. FDA is proposing to make this change for several reasons.

Public health concerns for deficient intakes of these nutrients have lessened considerably in the last 20 years. In addition, the agency has received numerous comments suggesting that this information is less critical to consumers than other types of information, especially as compared to information on food components associated with the risk for chronic disease. Therefore, to reduce the required elements on the nutrition label, which has been requested in comments from both consumers and industry, the agency tentatively concludes that information

pertaining to these three nutrients need no longer be required.

#### 6. Other Vitamins and Minerals

FDA is also proposing in § 101.9(c)(10)(ii) that declarations concerning the content of the remaining vitamins and minerals for which RDI's have been proposed may continue to be listed in nutrition labeling on a voluntary basis, unless they are added as nutrient supplements or claims are made about them. Given current dietary recommendations and the absence of established public health concerns that would be affected by these nutrients, FDA tentatively concludes that a requirement that these nutrients be declared is not warranted.

The complete list of vitamins and minerals for which RDI's have been proposed is set forth in § 101.9(c)(10)(iv), which can be found in a companion document in this issue of the *Federal Register*, entitled "Food Labeling; Reference Daily Intakes and Daily Reference Values."

#### 7. Synonyms

The current nutrition labeling regulations allow for the use of synonyms for four nutrients: ascorbic acid for vitamin C, folacin for folic acid, vitamin B<sub>1</sub> for thiamin, and vitamin B<sub>2</sub> for riboflavin. To simplify nutrition labeling and to avoid potential confusion among consumers, the agency will no longer allow the use of synonyms for thiamin and riboflavin in nutrition labeling of foods. The NAS/NRC publication on RDA's (Ref. 5) does not refer to thiamin as vitamin B<sub>1</sub> or to riboflavin as vitamin B<sub>2</sub>. Thus, the use of these synonyms can be considered outdated.

The terms "folacin" and "folate" are currently used interchangeably, and the term "ascorbic acid" is the commonly used chemical name for vitamin C. Therefore, the agency is proposing in § 101.9(c)(10)(v) to continue to permit the use of the term "ascorbic acid" as a synonym for vitamin C and the term "folacin" for folate.

However, in the interest of clarity and consistency, and to avoid consumer confusion, FDA is encouraging the use of the terminology presented in the NAS/NRC's RDA table, i.e., vitamin C and folate, rather than the synonyms. Additionally, the agency is proposing not to permit the term "ascorbic acid" to be used to refer to salts of ascorbic acid (ascorbates).

#### 1. Minimum Label Requirements

The agency is proposing that certain food components (i.e., calories from fat, saturated fatty acids, cholesterol, and

fiber), which, if this proposal is adopted, would otherwise be required elements of nutrition labeling, may be omitted from the tabular listing if they are not present in the food or are present in very small amounts. The amounts proposed are less than 1 gram of fat per serving for "calories from fat" (§ 101.9(c)(3)(i)) and "saturated fatty acids" (§ 101.9(c)(4)(i)), 2 mg of cholesterol for "cholesterol" (§ 101.9(c)(5)), and less than 1 gram of fiber for "fiber" (§ 101.9(c)(6)(iii)). When these components are omitted from the tabular listing, FDA is proposing to require that a statement appear within nutrition labeling that states "Not a significant source of \_\_\_\_\_" with the blank filled in by the missing components. (For clarity, if calories from fat and other of these components are omitted from the tabular listing, they should be listed separately in the statement, i.e., "Not a significant source of calories from fat or of saturated fatty acids, cholesterol, or fiber.") However, the agency is proposing to require that, at a minimum, the nutrition label include total calories, fat, carbohydrate, protein, and sodium. FDA believes that a standard core of information on energy value, sources of energy, and sodium content should prominently appear on all foods subject to mandatory nutrition labeling, including those with minimal nutrient content. If the nutrition label is to serve as an educational tool, FDA believes this core information is essential to aid consumers in learning about the relative nutritional qualities of all foods. Without information about these nutrients, the agency believes a consumer cannot adequately judge the consequences of the food selections that he or she makes.

The agency is also proposing in § 101.9(c)(10)(iii) to permit a similar disclaimer when the required vitamins or minerals are present in amounts less than 2 percent of the RDI per serving. As an alternative, the agency is proposing in § 101.9(c)(10)(iii) to continue to permit the use of an asterisk by the listed nutrient to refer the consumer to another asterisk that is placed at the bottom of the table and that is followed by the statement "Contains less than 2 percent of the Daily Value of this (these) nutrient (nutrients)."

As an example, the label of a carton of orange juice would only have to list calories, fat, protein, carbohydrate, and sodium on the top half of the label, followed by the statement "Not a significant source of calories from fat, or of saturated fatty acids, cholesterol, or fiber." Likewise, under "Percentage of Daily Value," that same orange juice label could state the content of vitamin C present in a serving, followed by "Not

a significant source of vitamin A, iron, and calcium." A sample label using these disclaimer statements can be seen in the appendix to this proposal.

FDA is proposing to permit the use of these statements in part to minimize the space required for nutrition labeling. Given this proposal to require nutrition labeling on most foods, many of which are in small packages, FDA believes that it is important that space requirements be kept to a minimum. The agency recognizes that a few comments and survey results (Ref. 14) give evidence that some consumers prefer having all values listed, even if they are zeros. However, practical considerations such as type-size requirements can make this difficult for many foods.

#### J. Nutrition Profile

In addition to comments at the hearings and on the ANPRM, the agency has received many comments over the years that have stated that the quantitative values reported in grams and milligrams in nutrition labeling are confusing to consumers because most consumers do not have any idea of whether those values are high or low. According to these comments, consumers are unaware of what amount of the nutrients and food components listed in nutrition labeling they should be consuming on a daily basis to provide a nutritious diet while minimizing risks for chronic diseases. Current labeling practices rely on consumer nutrition education programs and print materials to inform consumers of dietary goals. However, the apparent levels of consumer confusion suggest that new approaches are needed.

In a survey conducted by the National Food Processors Association (NFPA) (Ref. 14) and submitted as a part of their comment on the ANPRM, 6 label formats were rated by 2 groups of 200 consumers for purposes of meal planning, purchase decisions, and dietary concerns. Consumers expressed a preference for the label design that presented tabular nutrient values in the same manner as current labeling but that also included a nutritional profile that put important food components in the context of standards of daily consumption.

The agency is sufficiently persuaded by the results of this survey to propose to permit that this nutrition profile, with minor modifications, be incorporated into nutrition labeling at the manufacturer's discretion when space allows. The primary modification from the format used in the survey being proposed by FDA is the use of a percentage rather than an absolute

value for the amount of the food component in a serving. The agency sees no usefulness in repeating the absolute value that is already specified in the top half of the nutrition label. In addition, the use of a percentage value would continue the concept of percent of daily value being used for vitamins and minerals immediately above the nutrition profile.

Therefore, FDA is proposing in § 101.9(c)(11) to permit the voluntary inclusion of a "Nutrition Profile" of the product at the bottom of the nutrition label. This profile can include a list of all of the food components for which DRV's have been proposed in § 101.9(c)(11)(i) (see companion document "Food Labeling: Reference Daily Intakes and Daily Reference Values" appearing elsewhere in this issue of the Federal Register), the percent of the DRV present in a serving, and the DRV for each component. This information, while potentially of great value to consumers in using nutrition labeling, is a new and very complex concept. Therefore, the agency is taking a cautious approach and specifically requests comments as to whether the nutrition profile should be mandatory.

If a manufacturer decides to incorporate a nutrition profile into a product's nutrition labeling, the agency is proposing in § 101.9(c)(11)(ii) that the profile include all of the food components for which DRV's exist that are required parts of the nutrition label: fat, saturated fatty acid, cholesterol, carbohydrate, fiber, and sodium. Unsaturated fatty acids and potassium could be added at the option of the manufacturer [proposed § 101.9(c)(11)(iii)]. A sample label that illustrates the use of a Nutrition Profile may be found in the Appendix to this proposal.

Because this profile would be in addition to the current nutrition label (as modified in this document), the agency views it as an educational tool to help consumers understand the current label. The agency will continue to consumer test alternative label formats (such as a graphic format) and intends to issue proposed regulations dealing with the results of that testing.

#### K. Other Issues

##### 1. Claims of Significance

Current regulations state in § 101.9(c)(7)(v) that a food cannot claim (1) to be a significant source of a nutrient unless that nutrient is present at levels equal to or exceeding 10 percent of the U.S. RDA, or (2) to be nutritionally superior to another food unless it contains at least 10 percent more of the

U.S. RDA in a serving (portion). The agency is proposing in § 101.9(c)(11)(iv) to amend this section to change the term "U.S. RDA" to "RDI" and to add reference DRV's to cover label claims that might be made about food components such as dietary fiber.

Because some DRV's address food components for which there are recommendations to limit intake, FDA is also proposing to add to this section the requirement that no claim of superiority can be made for fat, saturated fatty acids, cholesterol, or sodium unless they are present in a food at levels 25 percent less than the comparison food. FDA is proposing this change, in proposed § 101.9(c)(11)(iv), to ensure that consumers are not misled into believing that an inconsequential reduction in these food components will provide significant nutritional advantages. The 25 percent level is consistent with FDA policy for comparative sodium claims (49 FR 15510 at 15521) and comparative cholesterol claims in § 101.25(a)(2)(iv), as stated in a document published elsewhere in this issue of the Federal Register entitled "Food Labeling: Definitions of Terms Cholesterol Free, Low Cholesterol, and Reduced Cholesterol."

##### 2. Analytical Procedures

To simplify the regulations, FDA is proposing to move references to the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC) and its incorporation by reference from the paragraphs pertaining to individual nutrients in § 101.9(c) and to place such references in § 101.9(e)(2). Specific methods of analysis are specified under § 101.9(c) when AOAC methods are not available.

However, in some cases, the specified or AOAC methods are not appropriate, and alternative methods must be used to prevent misrepresentation of the nutritional content. For example, some soluble fibers (e.g., gums) may contribute one to two calories per gram rather than the assumed value of zero. In other cases, the presence of a nutrient may not be detected with the specified methodologies (e.g., mono- and diglycerides are not detected with the AOAC method of analysis for fat). If the use of a specified method will result in a significant (10 percent or greater) underrepresentation of caloric value or misrepresentation of an available nutrient, such that the nutrients whose intake should be limited appear to be present at lower levels than is actually the case, then as proposed in § 101.9(e)(2), a more appropriate method of analysis should be used. One source of such methods, noted in a companion

document published elsewhere in this issue of the Federal Register entitled "Food Labeling: Definitions of the Terms Cholesterol Free, Low Cholesterol, and Reduced Cholesterol," is FDA's "Lipid Manual" (1989), which contains reliable methods for analysis of fat and fatty acids. FDA seeks comments on the methods that it can use to assure that nutrient content is not misrepresented and on how it can best advise the public when it intends to use alternative methods for compliance purposes.

##### 3. Increments for Reporting Caloric Content

FDA is proposing that caloric content be expressed to the nearest 5-calorie increment up to and including 50 calories and to the nearest 10-calorie increment above 50 calories. This proposed method is a change from § 101.9(c)(3) which allows 2-calorie increments up to and including 20 calories.

The agency considers this proposed method appropriate because it is also proposing to permit the declaration of calories from fat and fatty acids on the label. Because fat and fatty acids are declared in gram increments, and each gram contributes 9 calories, the caloric contribution of these food categories cannot be determined with sufficient accuracy to justify 2-calorie increments. Accordingly, to maintain consistency in caloric declaration, FDA is proposing in § 101.9(c)(3) which addresses total calories, in § 101.9(c)(3)(i) which addresses calories from fat, and in § 101.9(c)(3)(ii) which addresses calories from saturated fatty acids, unsaturated fatty acids, carbohydrates, and protein, to allow only 5- and 10-calorie increments.

##### IV. Exemptions

Many comments to the 1989 hearings and ANPRM addressed the issue of exemptions from nutrition information requirements. Some of the comments asserted that no exceptions should be made from such requirements while other comments asserted that many classes of food should be exempted. The agency has evaluated the merits of the comments requesting exemptions by balancing the effects of the requested exemption upon the information available to consumers against the benefits that would be derived by the affected industry.

After reviewing these comments, FDA believes that nutrition information can be practicably provided for most foods. However, the agency recognizes that such labeling is not practicable in all situations. The agency has therefore

identified, with the help of the comments, those situations in which such labeling is not practicable and is providing for them by proposing the following specific exemptions for affected foods or firms.

#### A. No Nutritional Significance

A number of comments requested that FDA provide an exemption for foods of no nutritional significance. One of the comments asserted that such an exemption should apply to soft drinks. Another comment asserted that the exemption should apply to honey, or if not, that honey labels should only be required to declare the serving size and the number of calories per serving.

FDA is proposing in § 101.9(a) that a food be classified as a "meaningful" source of calories or nutrients if it contains: (1) two percent or more of the RDI for protein, vitamin A, vitamin C, iron, or calcium per serving (portion), (2) more than 40 calories per serving (portion) or more than 0.4 calorie per gram, or (3) more than 35 milligrams of sodium per serving (portion). These criteria were selected to encompass both those nutrients whose consumption needs to be emphasized in the diets of Americans. The first criterion, if adopted, will require nutrition labeling if a food product contains, at a level of 2 percent or above the RDI, one or more of the four vitamins or minerals required to be declared in nutrition labeling. The level of 2 percent RDI is consistent with present regulations (§ 101.3(e)(4)(ii)), which define a measurable amount of an essential nutrient as 2 percent or more of the U.S. RDA (which FDA is proposing to rename as "RDI") and is based on an analytically detectable difference in nutrient content.

The second criterion, i.e., caloric definition, is consistent with FDA's definition of a low calorie food (21 CFR 105.66(c)). As a result, any food that is not low in calories would be required to bear nutrition labeling. Finally, the sodium requirement is consistent with the definition of "very low sodium" (21 CFR 101.13). If adopted, it will result in mandatory labeling of foods, such as certain spice blends, that may be a significant source of sodium but that would otherwise be excluded from mandatory nutrition labeling.

Because the agency is proposing to require that all foods that are meaningful sources of nutrients provide nutrition information, it is not necessary to propose an exemption for foods that are of no nutritional significance. Under the proposal, foods such as some spices and herbs will not need to bear nutrition labeling (see proposed § 101.9(a)). However, FDA advises that foods such

as soft drinks and honey will be required to bear nutrition labeling under these proposed provisions either because of their nutrition claims (diet soft drinks) or because of their caloric content (more than 40 calories per serving for regular soft drinks or more than 0.4 calories per gram for honey). FDA does not believe that labeling of only serving size and calories per serving should be permitted for any foods, including honey. The minimum nutrition labeling requirements, if adopted, will not require that a great deal of information be added to the label. (See minimum requirement labeling example in appendix of this proposal.)

The agency recognizes, however, that honey is frequently produced by small businesses, and that, as is discussed subsequently, exemptions are needed for such firms and are being proposed. If there is a need for a honey exemption beyond the proposed small business exemption, interested parties may substantiate the need and request an additional exemption in comments to this proposed rule.

#### B. Small Business

A number of comments addressed a need for an exemption for small businesses. One of these comments requested that food products sold by firms with an annual amount of food sales of not more than \$500,000 be exempt. The comment also requested that products not introduced or delivered for introduction across a State or territorial border by the manufacturer be exempt.

FDA recognizes that nutrient variability could present enormous feasibility problems for small businesses. Food products prepared by small businesses may not be prepared in sufficient quantity to consistently obtain raw materials of the same nutrient quality, may have transitory marketing characteristics, may be prepared differently each time, or may be subject to a variety of other problems. For example, farmers often market relatively small lots of products such as fresh fruits and vegetables, apple cider, honey, and maple syrup, on a seasonal basis through farmers' markets or through roadside food stands. Street vendors often sell equally small lots of foods such as popcorn or fresh fruit. In view of the fact that each complete nutrient analysis can cost between \$450 and \$700, the cumulative costs of providing nutrition information in such situations could impose significant burdens and possibly eliminate all profit from sales. Because the cost of providing nutrition information depends upon the

number and type of products produced, it is difficult to come to any general conclusions about the cumulative costs of providing nutrition information.

Accordingly, the agency is proposing in § 101.9(h)(1) an exemption for small businesses that should prevent imposition of nutrition labeling requirements where such labeling is not feasible, is impractical, or would create undue burdens. This proposed exemption pertains to firms whose annual sales do not exceed \$500,000 based on the most recent 2-year average of business activities. Where firms have been in business less than 2 years, as proposed, the exemption will apply to firms that can reasonably estimate that their annual sales will not exceed \$500,000 for the initial 2 years of business.

The agency chose the proposed \$500,000 criterion because it was requested by one of the comments and is consistent with a criterion included in a current bill before Congress (H.R. 3562, 101st Cong., 1st Sess. 1989). FDA solicits comments concerning whether this, or some other, criterion should be used to define small business for purposes of this exemption. The agency also requests comments on whether it should include an inflation factor in this exemption.

FDA does not agree that an exemption should be provided for products that are not shipped by the manufacturer across state or territorial borders. Such an exemption is not related to the feasibility of performing the analyses necessary for nutrition labeling. In addition, the products may already be in interstate commerce (e.g., because of the use of ingredients shipped in interstate commerce).

#### C. Restaurant Food

Other comments pointed out that nutrition labeling for foods served in restaurants and other types of food service facilities offering restaurant-type services (e.g., delicatessens, bakeries, feeding facilities in organizations such as schools, colleges, hospitals, and transportation carriers (such as trains and airplanes)) present significant feasibility problems in a number of situations. The comments made the following points: These facilities may not be able to develop consistent nutrient information on the foods that they sell because of frequent menu changes and variations in how the consumer wants the food prepared and served. Without nutrient consistency, frequent nutrient analyses would have to be performed to provide consumers with accurate nutrition labeling.

information. These analyses could become very burdensome. The cumulative costs of these analyses could place undue restrictions on some establishments. Firms could be inhibited from making frequent menu changes or forced to limit the options that consumers will have in ordering a food.

Accordingly, FDA believes that where these problems are present, food service facilities may not reasonably be expected to provide information concerning nutrient profiles, and that exemptive provisions should be established. Such provisions are included in this proposal in § 101.9(h)(2).

Similarly, FDA is proposing in § 101.9(h)(3) that food products in grocery stores be exempt from these requirements if the foods are provided to consumers from behind delicatessen or bakery counters or from self-service food bars, such as salad bars. The self-service food bar exemption does not, however, extend to all self-service food purchases in grocery stores. Many foods, such as candies, cookies, and pasta, are offered for sale from large containers such as barrels or bins. FDA has traditionally required that these foods be labeled in accordance with section 403(i)(2) of the act through the use of a counter sign or card on the labeling of the bulk container (21 CFR 101.100(a)(2)). The agency believes that nutrition labeling can be provided in a similar manner. Therefore, the agency proposes to require nutrition information for such foods.

Although the agency would like to limit these exemptions to only those situations where they are needed, FDA does not have sufficient in-depth knowledge of the food service industry to develop adequate criteria to fairly impose such limitations. The agency must therefore propose exemptive provisions that apply to all food service facilities offering restaurant-type services. However, the agency solicits comments on the feasibility of nutrition labeling of restaurant-type food. FDA intends to study this situation closely and will consider extending nutrition labeling requirements to appropriate food service facilities based on the comments received and the agency's assessment of the situation.

#### D. Small Packages

A number of comments requested an exemption for small packages because these packages simply do not have enough room for nutrition information. One comment suggested that small packages were individually packaged "bite size" pieces of food. Another comment asserted that a small package exemption should apply to packages of

cookies or snack cakes marketed in vending machines.

FDA recognizes that individually packaged "bite size" pieces of food cannot practicably bear nutrition information and agrees that an exemption should be established for these foods. However, the agency does not agree that packages of cookies or snack cakes generally need such an exemption when they are marketed in vending machines. They are significantly larger than "bite size" pieces of food and should have room for nutrition information.

Accordingly, FDA is proposing in § 101.9(h)(11) an exemption for individually packaged "bite size" pieces of food. However, this proposed exemption applies only to the provision of nutrition information on the label itself. It is contingent on nutrition information about these foods being made available to consumers in the manner proposed for food that is not packaged (see § 101.9(a)(2)). For example, a counter card or sign may contain the required information.

#### E. Packages with Variable Contents

One comment requested that packages with variable contents also be exempted from nutrition information requirements. The comment advised that such packages are marketed under terms such as "sampler," "random pack," "variety pack," and "assortments." The comment asserted that the contents of these packages are often random and changing, and that, as a result, nutrition information would be too costly.

FDA has not been persuaded that packages with variable contents should be exempt from nutrition information requirements. Such an exemption would simply be too broad and would encompass many situations where it could be feasible to provide this information. Therefore, FDA proposes in § 101.9(d)(1) that where assortments of food are packaged, firms will be required to express nutrient content based on the package as a whole (e.g., the entire product contents may be combined for a nutrient analysis).

#### F. Eggs

One comment requested that FDA permit the egg industry to place nutrition information inside the carton. The comment pointed out that the top lid of an egg carton that conforms to the shape of the eggs has very limited space, most of which must be used for other mandatory information.

The agency recognizes that many egg carton lids are manufactured to conform to the shape of the eggs within the

carton, and that under such circumstances it may not be feasible for nutrition information to appear on the lid. In view of the fact that consumers often open the lid in the grocery store before purchase to be sure the eggs are intact, FDA is proposing in § 101.9(h)(12) that egg cartons that have a top lid conforming to the shape of the eggs be permitted to have the nutrition information under the carton lid.

#### G. Multiunit Retail Packages

Another comment requested that where a consumer commodity is marketed in a multiunit retail package bearing the mandatory nutrition information, and the unit containers are not intended to be sold separately, the unit containers be exempt from nutrition information requirements.

FDA believes that it would be reasonable to grant this request provided the unit containers bear a statement that they are not labeled for retail sale. Accordingly, the agency is proposing in § 101.9(h)(13) an exemption for the unit containers within multiunit retail packages.

#### H. Foods Currently Subject to Exemptions From Nutrition Labeling

In response to a number of requests in the comments, FDA is proposing to retain (with minor editorial revisions) § 101.9(h)(2) (provisions pertaining to dietary supplements, proposed as § 101.9(h)(5)), § 101.9(h)(3) (provisions pertaining to foods that are the sole item of the diet, proposed as § 101.9(h)(6)), and § 101.9(h)(4) (provisions pertaining to foods for use solely under medical supervision, proposed as § 101.9(h)(7)). The agency is proposing to exempt the foods covered by these provisions, as well as infant formula, because they are already subject to special labeling requirements, which are set out elsewhere in Title 21, Chapter I of the Code of Federal Regulations.

The agency is proposing to retain § 101.9(h)(8) which exempts from labeling requirements foods shipped in bulk for use solely in the manufacture of other foods but does not apply to any bulk retail sales, and § 101.9(h)(9) (which applies to foods supplied for institutional use only). FDA is proposing to delete references to added nutrients and nutritional claims in § 101.9(h)(9) because these references are necessary if the agency makes nutrition labeling mandatory. The agency's reasons for establishing these exemptions were fully discussed in comment 41 in the March 14, 1973 (38 FR 6957 at 6958) final nutrition labeling regulation. These reasons centered around the fact that

consumers would not see nutrition information appearing on these products, and this situation has not changed. The agency knows of no reason why these exemptions should not be continued.

The agency is proposing to revise § 101.9(h)(1)(i) (proposed as § 101.9(h)(4)) so that it no longer references § 105.65, and so that it provides that foods, other than infant formula, specifically for use by infants and children less than 2 years of age are required to bear nutrition labeling in accordance with the proposed rule, except that they are not to include declarations of calories from fat and of fatty acid and cholesterol content. This action responds to comments that the agency has received that it should discourage the inappropriate application of adult dietary recommendations to infants and toddlers.

The agency is proposing to move § 101.9(h)(1)(ii), which permits declaration of U.S. RDA's [which FDA is proposing to call "RDI's"] for both infants and children 1 to 4 years of age on foods intended for use by both age groups to § 101.9(c)(10)(i). As discussed previously under section III.H. of this proposal, the agency is proposing to do this so that all references to declaration of percent RDI will be found in § 101.9(c)(10). FDA is also proposing that § 101.9(h)(1) (iii) and (iv) be removed. These paragraphs, which addressed protein quality issues, have been incorporated in proposed § 101.9(c)(7).

#### *I. Fresh Produce and Seafood*

Although a number of comments from representatives of the fresh produce industry requested that this industry be permitted to provide nutrition information on a voluntary, rather than a mandatory basis, many other comments, from consumers, consumer representatives, and other segments of industry, urged that nutrition labeling of fresh produce be made mandatory.

The agency believes that the nutritional significance of consumption of fresh produce is so great that an exemption of this broad class of foods from nutrition information requirements cannot be justified, particularly in light of the fact that some of these products now bear labels that make nutrition claims. FDA believes that nutrition labeling is feasible for fresh fruits and vegetables because of the special conditions relating to the use of data bases that the agency is proposing for this industry. Accordingly, FDA is proposing in § 101.9(h)(10) to limit the existing exemption from nutrition labeling to only those fresh fruits and vegetables that are sold in open

containers of not more than one dry quart.

Current § 101.9(h)(10) exempts all fresh fruits and vegetables from nutrition labeling requirements pending promulgation of specific labeling requirements for these products. This provision, which was intended to be a temporary exemption, was promulgated in the Federal Register of November 28, 1973 (38 FR 32786), after an industry complaint was filed in the U.S. District Court for the District of Columbia. Among other matters, the plaintiffs contended that FDA had not considered statutory obligations in section 405 of the act for the agency to exempt small open containers of fresh fruits and vegetables from any labeling requirements, and that the nutrition labeling regulations failed to explain sufficiently the manner in which this fresh produce was to be labeled.

FDA attempted to establish specific requirements for fresh produce subsequently in a proposed rule that appeared in the Federal Register of February 26, 1975 (40 FR 8214). However, the agency terminated this rulemaking proceeding in the Federal Register of June 14, 1983 (48 FR 27266), because FDA concluded that the costs that would derive from a requirement for the use of nutrition labeling would outweigh any benefits that the consumer could receive.

As is discussed elsewhere in this preamble, however, recent reports have established that the benefits of sound nutritional practices are great. It is clear that they were significantly undervalued in 1983. Consumers now clearly perceive the importance of this information to their health. Consequently, FDA considers it appropriate to propose to require nutrition labeling on fresh fruits and vegetables in most circumstances. Further, this proposed rule provides directions for displaying nutrition information where products are not packaged (§ 101.9(a)(2)).

In accordance with the statutory requirement that FDA provide labeling exemptions for small open containers of fresh fruits and vegetables, the agency is proposing in § 101.9(h)(10) to exempt fruits and vegetables in open containers of less than 1 dry quart (approximately 1,100 milliliters) from nutrition labeling requirements. The definition of "small containers" in this section is consistent with the agency's definition of such containers in § 101.100(c). That section exempts small open containers of fresh fruits from several labeling requirements of the act. However, the agency's statutory responsibility to establish exemptions does not extend beyond small open containers, and grocery

stores may want to convey information concerning produce in these containers to consumers. The proposed exemption therefore specifies that any shipping container that contains more than one of these containers will be required to bear full nutrition labeling.

Moreover, FDA believes that Congress did not intend to permit labeling that is voluntarily employed by a seller to be false or misleading or otherwise in violation of the act. As the agency explained in the Federal Register of February 26, 1975 (40 FR 8215), section 201(n) of the act provides that in determining whether the labeling of a product is misleading, there shall be taken into account not only representations made but also the extent to which the labeling fails to reveal facts material in the light of such representations. Proposed § 101.9 sets forth the facts that are material if any nutrition claim or information is included in the labeling. Consequently, the agency is proposing to treat small open containers of fresh produce the same way it treats most other foods. The presence of any nutrition claim or other nutrition statement on the label, labeling, or advertising of such containers will require that the products bear full nutrition labeling information. If they fail to do so, they will be misbranded under sections 201(n) and 403(a) of the act because their labeling will fail to reveal facts that are material in light of the representations made therein.

The agency recognizes that considerable nutrient variability is a common characteristic for most fruits and vegetables. Comments to the ANPRM reaffirmed this view. Unlike most manufactured foods, for which nutrient content can largely be controlled, the natural nutrient content of produce is subject to numerous influences (such as season, storage, and variety) that cause the levels of some nutrients to differ significantly between "lots" or shipments. Also, the sizes of various fresh foods (e.g., apples, oranges, bananas) vary considerably.

FDA has long recognized this problem and has worked with various trade associations to develop data bases that take into account these sources of potential variation. The agency encouraged this development of data bases in the 1979 labeling ANPRM (see section I.B. of this preamble). The advantage of such data bases is that they permit the development of a generic nutrition label for an average serving size of an item of produce that takes into account such factors as season, variety, and the location grown.

Generic labels would reduce the burden associated with developing the data base and reduces the number of nutrition labels that a food retailer would need to maintain. For example, FDA has already approved a data base that allows a common label applicable to all varieties, types, and geographic sources of broccoli. Additionally, this type of generic nutrition label can be developed at a lower cost by trade associations than would be the case if individual growers or packers had to develop data bases for individual varieties of produce grown in one location. The disadvantage is that the variability gives rise to a nutrition label that may understate, for example, the nutritional value of a particular variety of produce or of produce from a particular region because of the need for the label to cover industry-wide variations. Likewise, the nutritional value may be under- or overstated for produce that varies in size such as apples, oranges, and bananas.

FDA is proposing to extend mandatory nutrition labeling to fresh produce. Because of the variability problem, this proposal has the potential for imposing a significant analytic and economic burden on this segment of the food industry. Consequently, FDA also is proposing in § 101.9(e)(7) to exempt, under certain conditions, fresh fruits and vegetables from the agency's procedures for determining label compliance with § 101.9. The conditions are: the nutrition information provided is in accordance with an FDA-approved data base, the nutrition label has been computed following FDA guidelines, and the food has been handled in accordance with good manufacturing practice to prevent nutrient loss. Comments are requested on further measures to reduce the burdens associated with implementing nutrition labeling of fresh produce. For example, the agency requests comments on whether an exemption, or phase-in-time, necessary for low-volume rare or exotic produce or for a new produce item being introduced to American consumers is necessary. If so, the agency requests comments on how such items should be defined and what timeframes would be appropriate for phase-in?

While food retailers will be responsible, if this proposal is adopted for having the nutrition information required in § 101.9 available at the point of purchase, the agency expects that the information will generally be developed by trade or marketing associations.

Any segment of the food industry interested in development of a data base for fresh produce could compile appropriate food content data and submit the raw data and a proposed nutrition label to FDA. If the data and label meet the agency's requirements, FDA would approve the data base for a limited period, e.g., 10 years. Renewals would be allowed, unless there have been demonstrated changes in agricultural or industry practices. When agricultural or industry practices change (e.g., a change occurs in a predominant variety produced), or when FDA monitoring suggests that the data base is no longer representative of the produce item sold in this country, FDA approval of the data base and nutrition label will be revoked, and a petition for approval of a revised data base and nutrition label will be required.

FDA believes that use of FDA-approved data bases and nutrition labels should relieve the labeling concerns raised repeatedly by the produce industry. The agency's reviews of current industry data bases suggests that the proposed compliance policy is both useful and practical. However, FDA advises that organizations obtaining data base and nutrition on label approval, will be held responsible for continued maintenance of the data base. As already noted, if FDA surveillance activities indicate that an approved data base may no longer be appropriate, the agency's approval will be withdrawn.

FDA does not intend to prohibit the use of data bases not specifically approved by the agency. If this proposal is adopted, organizations will be free to use other data bases that they believe validly reflect the nutrient contents of their products. However, labeling computed from these data bases will be subject to the compliance procedures of § 101.9(e) (1) through (6).

Firms desiring information concerning guidance on data base development and nutrition label computation may request a copy of "Compliance Procedures For Nutrition Labeling" from the Division of Nutrition, Center for Food Safety and Applied Nutrition (HFF-260), 200 C St. SW., Washington, DC 20204. The agency is updating this document, and the new revision, which will be designated "FDA Nutrition Labeling Manual—A Guide for Using Data Bases," will be available by the time of the issuance of a final rule in this proceeding. FDA solicits comments from all affected parties concerning any changes that may be needed in "Compliance Procedures For Nutrition Labeling," so that the agency can

consider such changes for inclusion in the revision of this document.

The agency advises that FDA will consider approving data bases for other products subject to the rule if a clear need is presented. For example, comments from the seafood industry indicate that FDA approved data bases may be necessary for raw fish and shellfish. The comments asserted that the nutrition profile for raw fish will vary by season, size, age, sex, geographic origin, and whether the fish are caught wild or are cultured. Comments pointed out that there are several hundred species of fish and shellfish, and that for many of these species, there are no established nutrition data. In addition, comments asserted that the current retail marketing practices for fresh fish and shellfish makes nutrition labeling impractical.

In this situation, as in the case with fresh produce, the nutritional significance of this broad food commodity is too great to consumers to justify an exemption. FDA believes that it is feasible for this industry to meet nutrition information requirements if a cooperative effort is made to develop appropriate data bases for categories of seafood. The discussion above pertaining to data bases, generic nutrition labels, and exemptions for fresh produce apply similarly to seafood and comments are likewise requested. For example, it may be possible to develop a data base which would justify a common label for all varieties of fresh tuna, similar to broccoli. A significant amount of information on the nutrient content of various aquatic species has already been compiled. Careful review may reveal that much of this data can be used to develop acceptable interim nutrition labels. Further, FDA believes that the proposed requirements for display of nutrition information where food is not in packaged form (§ 101.9(a)(2)) will be compatible with current marketing practices for fresh fish and shellfish.

#### *J. Additional Exemptions*

Because FDA recognizes that the proposed exemptive provisions may not have included all situations in which nutrition information is not feasible, is impractical, or would create undue burdens, the agency solicits comments from affected parties concerning specifically what additional provisions may be necessary. In proposed § 101.9(e)(8), the agency states that affected parties may submit petitions for additional exemptions or alternative means of providing nutrition information

for specific types of food if they can substantiate that nutrition labeling is not feasible, is impractical, or would create undue burdens for these products.

The agency also recognizes that there will be some situations covered by exemptions in which nutrition information is feasible, and in which firms may wish to provide such information to consumers. Under such circumstances, FDA encourages the firms to do so. Of course, when firms voluntarily elect to provide this information for a food, the food becomes subject to all requirements of this section, and nutrition information must be presented appropriately.

#### V. Other Nutrition Labeling Provisions

For clarity and completeness, FDA is publishing the following paragraphs set forth in § 101.9 for which either no changes or minor nonsubstantive changes are being made. These proposed paragraphs are § 101.9(a)(3) (formerly § 101.9(a)(1)), (a)(4) (formerly § 101.9(a)(2)), (c) (1) and (2), (e)(1), (e)(3), (e)(4), (f), and (g).

#### VI. Other Actions

##### A. Effective Date

FDA is proposing to make these regulations effective 1 year after the publication of a final rule. The agency's normal practice is to make food labeling regulations effective on the uniform compliance date that follows publication of the final rule. FDA periodically (every 2 years) establishes these uniform compliance dates to limit the economic impact of requiring individual label changes on separate dates and to give industry sufficient lead time to make label changes. (The current uniform compliance date for all FDA final food labeling regulations that are published in the *Federal Register* after January 1, 1990, and before January 1, 1992, is January 1, 1993 (see 55 FR 276; January 4, 1990). However, the agency considers that a deviation from this practice is appropriate here because of the importance of the changes that the agency is proposing and because of the great consumer interest in these matters.

The agency recognizes that this proposed action will shorten the amount of time that manufacturers have to exhaust label inventories. However, the reduction in time will not be great, and the agency tentatively concludes that any costs that may result will be outweighed by the benefits from the improved nutrition label.

##### B. Institute of Medicine Contract

The Public Health Service, DHHS, and the Food Safety and Inspection Service,

USDA, jointly contracted with the Food and Nutrition Board of the Institute of Medicine (IOM), National Academy of Sciences, to develop options for changes in food labeling that will assist consumers in implementing recommendations of the Surgeon General's Report on Nutrition and Health. Work on this contract was initiated on September 1, 1989, with a final report due in September 1990. The work statement for this contract emphasizes the need for guidance on scientific issues surrounding changes in nutrition labeling content, nutrition labeling format, ingredient labeling, adjectival descriptors, and serving sizes of foods.

Since the report is expected to be received during the comment period for this proposal, FDA intends to consider it in formulating the final rule based on this proposal. Upon the completion and submission of this report to DHHS and USDA, the agency will publish a notice of its availability in the *Federal Register*, so that other interested persons may comment. These comments should focus on the implications of the IOM report for the matters set out in this and the other related food labeling proposals.

##### C. International Harmonization

In the preamble to the August 8, 1989, ANPRM, the agency solicited public comment on how FDA could best harmonize its food labeling regulations with those of other nations, particularly with the European Economic Community and Canada. Several comments were received in response to the ANPRM and were considered in arriving at this proposal. Further comment from foreign governments and international organizations to this specific proposal are requested.

The agency will continue to focus on the international activities taking place in the area of nutrition labeling as it considers the comments to this proposal. Of particular importance will be the activities of the Commission of the European Communities, the Codex Alimentarius Commission, and current harmonization efforts with Canada under the United States/Canada Trade Agreement. FDA therefore invites comment on this proposal with respect to the nutrition labeling requirements of other governments and on how this proposal might be modified to minimize its impact on international trade.

##### D. Consumer Education Program

FDA recognizes that a coordinated public education campaign will be needed to make the new food label a successful tool in improving the American diet. FDA intends to plan and

put in place an effective education effort, including consumer pamphlets, press releases, and consumer meetings, which will address basic nutrition principles and ways in which food labels can be utilized to help consumers implement dietary recommendations. Consumer education programs and materials will be needed to convey in practical terms exactly what the information on food labels means, and how it can be used to make point-of-purchase decisions, as well as to assist in designing life-long dietary modifications intended to improve health. To reach these goals, the agency intends to work cooperatively with the States and with other Public Health Service agencies that have responsibilities for nutrition education and health promotion.

##### E. Evaluation of Food Labeling Initiatives

The evaluation of food labeling is an ongoing process. Should the agency adopt the changes that it is proposing, FDA will take special measures to evaluate the impact of the regulations that it puts into place and assess whether the regulations accomplish their goal of helping individuals to achieve a more healthful diet. As a part of this effort, FDA will continue to conduct national consumer surveys to measure consumer knowledge of nutrition and diet, consumer usage and understanding of nutrition information, and consumer needs for nutrition information. In addition, through its Food Labeling and Packaging Survey, FDA will monitor the extent and type of nutrition information that is being provided in the marketplace.

##### VII. Proposed Amendments to Other Regulations

For consistency, FDA is proposing to amend a number of other regulations.

##### A. Sodium

Because the agency is proposing to require nutrition labeling on most food products that are meaningful sources of nutrients, and because sodium content is a mandatory component of nutrition labeling, the regulations that permit sodium content to be labeled in isolation (i.e., without full nutrition labeling) are not consistent with the regulatory scheme proposed in this document. Therefore, FDA is proposing to amend §§ 101.13(a)(5) and 101.13(b)(3) by removing references to § 105.69 and to amend § 105.69 to no longer permit sodium content labeling without full nutrition labeling. Any food product, including those exempted under

paragraph (h) of proposed § 101.9, that is labeled with a claim for sodium content will be required to bear full nutrition labeling.

#### B. Cholesterol

In the Federal Register of November 25, 1986 (51 FR 42584), FDA published a proposal to encourage cholesterol and fatty acid labeling on foods by amending the food labeling regulations to define, and provide for the proper use of, the terms "cholesterol free," "low cholesterol," and "reduced cholesterol" in the labeling of foods. The agency also proposed to permit truthful and nonmisleading declarations about the cholesterol content of foods and to amend current regulations regarding label declaration of the cholesterol and fatty acid content of foods.

FDA is publishing elsewhere in this issue of the Federal Register a tentative final regulation based on the 1986 proposal that defines terms related to cholesterol content of foods and sets conditions for their use. However, this nutrition labeling proposal will affect any final rule based on that tentative final regulation, in that the agency is now proposing to make cholesterol and saturated fatty acid content mandatory components of nutrition labeling, whereas the tentative final cholesterol labeling regulation only requires this declaration when a cholesterol or fatty acid claim is made. In this document the agency is proposing only minimal changes to existing § 101.25, to be consistent with the proposed changes in § 101.9, with the understanding that if the agency ultimately makes any changes in § 101.9 that are inconsistent with a final rule on cholesterol and fatty acid labeling (as yet to be published), FDA intends to resolve those differences where possible or to request comment on any substantive changes required to make the two regulations consistent.

#### VIII. Preemption

Numerous comments at the public hearings and on the ANPRM suggested that these Federal nutrition labeling regulations should explicitly preempt any State nutrition labeling regulations. The preemption issue is complex and divisive: whether a uniform, national label is necessary for consumers and manufacturers to function in the marketplace versus whether States should be permitted to require additional information for their residents. The input of States, as well as consumers, businesses, and other concerned parties is essential in evaluating this matter. FDA therefore requests comment on the issue of whether preemption is appropriate.

#### IX. Economic Impact

FDA is proposing several changes affecting food product labels. In accordance with Executive Order 12291, FDA has prepared a preliminary regulatory impact analysis (PRIA) to determine the economic effects of the proposed rules to amend food labeling regulations under 21 CFR Part 101. This analysis also satisfies the requirements of the Regulatory Flexibility Act (Pub. L. 96-354). The PRIA is on file and may be reviewed at the Dockets Management Branch (address above).

Based on preliminary data, FDA estimates that the proposed rules would impose a first year cost of \$315 million and recurring costs of about \$60 million annually. Therefore, in accordance with Executive Order 12291, these rules are major, and the agency will have to develop a final regulatory impact analysis (RIA) before issuing final rules. FDA specifically encourages comments from the public on the benefits and costs of the proposed changes. Based on its preliminary assessment, the agency believes that the potential health benefits are substantial and thus justify the costs associated with mandating nutrition labeling. However, FDA plans to take into consideration the conclusions of the final RIA, as well as all comments received on the relative benefits and costs of the proposed changes, in developing any subsequent final rules based on these proposals.

Because FDA is proposing several related changes affecting food product labels, which, if adopted, will become effective concurrently, the agency has considered their combined economic impacts and, where possible, separated out the contribution of each. The benefits of the proposed requirements are increased health and reduced search-time for consumers. The costs of the proposed rules will be shared by food manufacturers and food stores and are grouped into five categories: (1) Administrative costs; (2) relabeling costs; (3) testing costs; (4) reduced ingredient flexibility costs; and (5) food store display costs.

##### A. Benefits

The primary benefits of the proposed rules are improved health. These benefits will follow both from consumers being able to choose a more nutritious diet based on clearer and newly provided information, and from consumers being offered an increased number of nutritious products by firms competing to supply products to a better informed public. In addition, consumers will not have to rely on secondary

sources for a supply of this health information.

Although numerous studies indicate that improved health status can be achieved through better informed dietary choices, FDA has not yet completed its study on the quantification of this diet-disease relationship. This study is underway, however, and its results will be available before the final rule is issued.

##### B. Costs

The two major groups who will be affected by this regulation are food manufacturers and food stores. The initial one-time cost to these affected parties is estimated to be approximately \$315 million. In addition, it is estimated that the recurring cost of this regulation will be approximately \$60 million annually. These figures are broken down in more detail below. It should be emphasized that portions of the cost estimates are to be considered preliminary as FDA is currently conducting a labeling cost study which is expected to be completed before the final rule is issued.

##### C. Cost to Food Manufacturers

The cost to manufacturers of processed foods falls into four categories: (1) Administrative costs; (2) testing costs; (3) relabeling costs; and (4) reduced ingredient flexibility costs.

##### 1. Administrative Costs

The administrative costs associated with a regulation are the dollar value of the incremental administrative effort expended in order to comply with a particular regulation. The administrative activities which are anticipated to be undertaken in response to a change in a regulation include identifying the policy, interpreting the policy, determining the scope and coverage relative to the firms' product labels, formulating a method for compliance, and managing the compliance process.

It is estimated that approximately 21,000 firms will be affected by these regulations. FDA has no current information regarding the magnitude of the initial or recurring administrative costs per firm. However it is plausible that for some firms, administrative costs may be considerable given the complexity of the revised requirements—especially for firms who have never previously engaged in nutrition labeling.

##### 2. Testing Costs

The value of testing costs for those firms who have never voluntarily provided nutrition information will be

higher than for those firms whose products currently carry some nutrition labeling and may only have to test for one or two additional nutrients. In addition, for those who currently provide nutritional information on food labels, some nutrients will no longer be required which may partially offset the cost of the new nutrient tests.

FDA estimates that approximately 50 percent of products are not currently tested for nutrition information. The initial incremental cost for products which have never had nutrition labeling will be the testing costs associated with all of the macronutrients and micronutrients contained in the revised label. Estimates for the frequency of testing were made from assessing current industry practices. In most cases, the number of analyses required for the initial nutrient data base was found to be six. The initial analysis cost associated with this regulation is estimated to be approximately \$140 million for products which are not currently testing for nutrition information and \$75 million for those products which are currently testing for nutrition information.

Recurring costs for analysis include the same analytical costs as estimated above, but the frequency of the analyses differs. Industry information indicates that the number of analyses required to assure consistency between the nutrient content of the product and the nutrition label declaration can range from once per year to four times per year, however, one analysis of a composite of 12 samples per plant on an annual basis was the most frequently cited practice. Recurring costs are reduced to approximately \$23 million for products which are not currently nutrition tested and \$8 million for products currently nutrition tested.

### 3. Relabeling Costs

Preliminary estimates indicate that approximately 21,000 firms will have to modify approximately 77,600 food labels. Based on available information it is estimated that the average cost for a one-color printing change is approximately \$1,000 per label. This yields an estimated one-time relabeling cost of \$77 million.

In addition, a recurring relabeling cost may occur if firms find that their labels are not consistent with their food product formulations because of normal variations in raw materials over time. Recurring relabeling cost is estimated to be approximately \$2 million annually.

### 4. Reduced Ingredient Flexibility Costs

Another possible and more subtle cost of this regulation concerns the use of

and/or labeling with fats and oils. Manufacturers have maintained that the mandatory declaration of saturated fatty acids would cause them to either: (1) rely on a single source of fats or oils; or (2) maintain a different label for each oil or combination of fats/oils likely to be utilized. The manufacturer could then change labels as the product formulation changed in response to price and availability considerations. Manufacturers have stated that as they change the combination of fats and oils in response to market conditions, the level of saturated fat may change which precludes the possibility of maintaining one label and virtually eliminates the usefulness of "and/or" labeling for fat and oils.

However, FDA believes that the problem is less severe. Although manufacturers will not be as flexible in substituting between various oils, FDA believes that requiring the declaration of only saturated fatty acids has retained sufficient flexibility for manufacturers. FDA believes that manufacturers will be able to substitute between similar oils which will cause only minimal effects on the costs (and subsequent prices) of the final goods.

### D. Costs to Food Stores

This regulation requires that when food is not in packaged form, the required nutrition labeling information shall be displayed clearly at the place of purchase either as a counter card or in a booklet made available to the consumer upon request. If the nutrition information is kept in a binder, a notice must prominently advise that nutrition information is available upon request. Compliance costs will vary across food stores. However, as an initial estimate, FDA estimates that this regulation will affect approximately 120,000 food stores and will cost approximately \$200 per food store annually. Thus, FDA estimates the cost of displaying mandatory nutrition labeling in food stores to be approximately \$25 million.

This figure does not include the cost of developing the nutritional data on the affected products. As stated earlier in this document, FDA believes that much of this information will be developed in the form of data bases, possibly by trade associations. Further, FDA recognizes the problems inherent in the development process but believes the advantages outweigh the testing of individual lots due to regional differences, seasonal variation, etc. The agency does not currently have data on the costs of developing data bases or the number of products for which this would be feasible and is requesting relevant comments.

### E. Impact on Small Entities

This regulation exempts food products bearing no nutrition claim or information on the food label or in advertising sold by firms offering food for retail sale, where the firm has annual food sales less than \$500,000 based on an average of the most recent 2 years.

This regulation also provides flexibility in terms of complying with the mandatory nutrition labeling provisions. When it is not technologically feasible or some other circumstances make it impracticable for firms to develop adequate nutrient profiles to comply with the mandatory nutrition labeling requirements, FDA may establish by regulation alternative means of compliance or additional exemptions to deal with the situation.

### F. Conclusion

Based on preliminary data, FDA estimates that the proposed rules would impose a first-year cost of about \$315 million and recurring costs of about \$60 million annually. Therefore, in accordance with Executive Order 12291, these rules are major. To help place these costs in perspective, the estimates imply that for each \$100 of food purchased, the costs would be about \$0.11 in the first year and about \$0.02 in each recurring year. On average, these costs total about \$3.15 per household in the first year and about \$0.60 per household in each recurring year. Although authoritative studies of the value of this information to consumers have not yet been completed, FDA believes that the overall health benefits will exceed these costs. However, as noted earlier, FDA plans to take into consideration the conclusions of the final RIA, as well as all comments received on the relative benefits and costs of the proposed changes, in developing any subsequent final rules based on these proposals.

Also, in accordance with the Regulatory Flexibility Act (Pub. L. 96-354), FDA certifies that because of the exemptions and flexibility provided, these rules will not have a significant impact on a substantial number of small entities, including small businesses.

A preliminary regulatory impact analysis supporting these findings is on file and may be seen at the Dockets Management Branch (address above). FDA requests that any interested parties, including food manufacturers, food retailers, trade associations, health professionals, consumers, etc., submit any additional information regarding the validity of these cost estimates or the

cost of complying with these proposed regulations in general.

#### X. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### XI. References

The following information has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday:

1. U.S. Department of Health and Human Services, Public Health Service, "The Surgeon General's Report on Nutrition and Health," Washington, DC, DHHS (PHS) Publication No. 88-50210, U.S. Government Printing Office, 1988.

2. Committee on Diet and Health, Food and Nutrition Board, Commission on Life Sciences, National Research Council, "Diet and Health: Implications for Reducing Chronic Disease Risk," Washington, DC, National Academy Press, 1989.

3. U.S. Department of Agriculture and U.S. Department of Health and Human Services, "Nutrition and Your Health: Dietary Guidelines for Americans," Washington, DC, Home and Garden Bulletin No. 232, 2d Ed., U.S. Government Printing Office, 1985.

4. Bender, M., Division of Consumer Studies (HFF-240), Center for Food Safety and Applied Nutrition, Food and Drug Administration, "Status of Nutrition and Sodium Labeling on Processed Foods, 1988," 200 C St. SW., Washington, DC, 20204, July 14, 1989.

5. Subcommittee on the 10th Edition of the RDA's, Food and Nutrition Board, Commission on Life Sciences, National Research Council, "Recommended Dietary Allowances, 10th Ed.," Washington, DC, National Academy Press, 1989.

6. Butrum, R.R., C.K. Clifford, and E. Lanza, "NCI Dietary Guidelines: Rationale," *American Journal of Clinical Nutrition*, 48:888-895, 1988.

7. Population Panel, National Cholesterol Education Program, National Heart, Lung, and Blood Institute, National Institutes of Health, "Report of the Expert Panel on Population Strategies for Blood Cholesterol Reduction," (Draft), Bethesda, MD, February 2, 1990.

8. Life Sciences Research Office, Federation of American Societies for Experimental Biology, "Physiological Effects and Health Consequences of Dietary Fiber," Bethesda, MD, 1987.

9. U.S. Department of Health and Human Services, Public Health Service, "Promoting Health/Preventing Disease, Year 2000 Objectives for the Nation," Draft for Public

Review and Comment, Washington, DC, September 1989.

10. Anderson, L., M.V. Dibble, P.R. Turkki, H.S. Mitchell, and R.J. Rynbergen, "Nutrition in Health and Disease," 17th ed., Philadelphia, Lippincott Co., 1982:19-33.

11. Bar, A., "Xylitol," in *Alternative Sweeteners*, Nabors, L.O., and R.C. Gelardi, eds., New York, Marcel Dekker, Inc., 1986:185-216.

12. Joint Food and Agriculture Organization/World Health Organization/United Nations University Expert Consultation, World Health Organization Technical Report Series 724, "Energy and Protein Requirements," Geneva, 1985.

13. Levy, A.S. and J.T. Heimbach, Division of Consumer Studies (HFF-240), Center for Food Safety and Applied Nutrition, Food and Drug Administration, "Recent Public Education Efforts About Health and Diet in the United States," 200 C St. SW., Washington, DC 20204, 1989.

14. National Food Processors Association, "Summary of Findings, Food Labeling and Nutrition \* \* \* What Americans Want," Washington, DC, 1990.

#### XII. Appendix

##### Basic Label Requirements: Breakfast Cereal

###### NUTRITION INFORMATION PER SERVING

Serving size: 1 ounce (28 g) (1/2 cup)	
Servings per container: 16:	
Calories.....	110
Calories from fat.....	20
Fat.....	2 g
Saturated fatty acid.....	1 g
Cholesterol.....	0 mg
Carbohydrate.....	21 g
Fiber.....	2 g
Protein.....	2 g
Sodium.....	140 mg
Percent of Daily Value:	
Vitamin A.....	25
Vitamin C.....	0
Calcium.....	6
Iron.....	25

##### Or: Breakfast Cereal

###### NUTRITION INFORMATION PER SERVING

	Amount	Calories
Serving size: 1 ounce (28 g) (1/2 cup)		
Servings per container: 16:		
Calories.....		110
Fat.....	2 g	20
Saturated fatty acid.....	1 g	
Cholesterol.....	0 mg	
Carbohydrate.....	21 g	
Fiber.....	2 g	
Protein.....	2 g	
Sodium.....	140 mg	
Percent of daily value:		
Vitamin A.....	25	
Vitamin C.....	0	
Calcium.....	6	
Iron.....	25	

##### Expanded Label: Butter Flavored Popcorn

###### NUTRITION INFORMATION PER SERVING

	Amount	Calories
Serving size: 1 ounce (28 g) (2 cups):		
Servings per container: 4:		
Calories (Energy).....		160 (670 KJ)
Fat.....	10 g	90
Saturated (20 calories).....	2 g	
Unsaturated (70 calories).....	8 g	
Cholesterol.....	0 mg	
Carbohydrate.....	15 g	60
Complex carbohydrate.....	14 g	
Sugars.....	1 g	
Sugar alcohol.....	0 g	
Fiber.....	2 g	
Soluble Fiber.....	1 g	
Insoluble fiber.....	1 g	
Protein (5 percent of daily value).....	2 g	10
Sodium.....	240 mg	
Potassium.....	150 mg	
Percent of daily value:		
Vitamin A.....	0	
Vitamin C.....	0	
Calcium.....	0	
Iron.....	2	

###### NUTRITION PROFILE

Component	Per cent of daily value	Daily value
Fat.....	13	75 g*
Saturated Fatty Acid.....	8	25 g*
Unsaturated Fatty Acid.....	15	50 g*
Cholesterol.....	0	300 mg
Carbohydrate.....	5	325 g*
Fiber.....	7	25 g*
Sodium.....	10	2,400 mg
Potassium.....	4	3,500 mg

\*As part of a 2,350 calorie diet.

##### Minimum Requirements: Jelly Beans

###### NUTRITION INFORMATION PER SERVING

Serving size: 1 1/2 ounces (42 g):	
Servings per container: 16:	
Calories.....	150
Fat.....	0 g
Carbohydrate.....	38 g
Protein.....	0 g
Sodium.....	15 mg
(Not a significant source of calories from fat, or of saturated fatty acids, cholesterol, or fiber)	
Percent of daily value:	
(Not a significant source of vitamins A or C, calcium or iron)	

##### List of Subjects

###### 21 CFR Part 101

Food labeling, Reporting and recordkeeping requirements.

## 21 CFR Part 105

Dietary foods, Food grades and standards, Infants and children, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 101 and 105 be amended as follows:

## PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

## § 101.3 [Amended]

2. Section 101.3 *Identity labeling of food in packaged form* is amended in paragraph (e)(4)(ii) by removing “§ 101.9(c)(7)(iv)” and replacing it with “§ 101.9(c)(10)(iv)”.

3. Section 101.9 is revised to read as follows:

## § 101.9 Nutrition labeling of food.

(a) Nutrition information relating to food shall be provided for all products that are meaningful sources of calories or nutrients, or whose label, labeling, or advertising contains a nutrition claim or any other nutrition information, in conformance with the requirements of this section unless an exemption is provided for the product in paragraph (h) of this section. A product shall be considered a meaningful source of nutrients or calories if it contains 2 or more percent of the Reference Daily Intake (RDI) per serving (portion) for protein (see paragraph (c)(7)(iii) of this section), vitamin A, vitamin C, iron, or calcium (see paragraph (c)(10)(iv) of this section); provides more than 40 calories per serving (portion) or more than 0.4 calories per gram (g), as consumed; or contains more than 35 milligrams (mg) of sodium per serving (portion).

(1) When food is in package form, the required nutrition labeling information shall appear on the label, in the format specified in this section.

(2) When food is not in package form, the required nutrition labeling information shall be displayed clearly at the point of purchase (e.g., on a counter card, sign, tag affixed to the product, or some other appropriate device). Alternatively, the required information may be placed in a booklet, loose-leaf binder, or other appropriate format that is available at the point of purchase.

(3) Solicitation of requests for nutrition information by a statement “For nutrition information write to \_\_\_\_\_” on the label or in the labeling or advertising for a food, or providing such information in a direct written reply to a solicited or unsolicited request, does not subject the label or the labeling of a food exempted under paragraph (h) of this section to the requirements of this section if the reply to the request conforms to the requirements of this section.

(4) If any vitamin or mineral is added to a food so that a single serving provides 50 percent or more of the RDI for the age group for which the product is intended, as specified in paragraph (c)(10)(iv) of this section, of any one of the added vitamins and/or minerals, unless such addition is permitted or required in other regulations, e.g., a standard of identity or nutritional quality guideline, or is otherwise exempted by the Commissioner, the food shall be considered a food for special dietary use within the meaning of § 105.3(a)(1)(iii) of this chapter.

(b) [Reserved].

(c) The declaration of nutrition information on the label and in labeling shall contain the following information except for that which is voluntary as set forth in this paragraph in the following order, using the headings specified, and displayed with equal type size, under the overall heading of “NUTRITION INFORMATION PER SERVING (PORTION).” Alternatively, the terms “PER SERVING (PORTION)” may be placed directly below the terms “NUTRITION INFORMATION.”

(1) “Serving (portion) size”: A statement of the serving (portion) size.

(2) “Servings (portions) per container”: The number of servings (portions) per container.

(3) “Caloric content” or “Calories”: A statement of the caloric content per serving (portion), expressed to the nearest 5-calorie increment up to and including 50 calories, and 10-calorie increment above 50 calories. Energy content per serving (portion) may also be expressed in Kilojoule units, added in parentheses immediately following the statement of the caloric content. Caloric content may be determined by the Atwater method as described in A.L. Merrill and B.K. Watt, “Energy Value of Foods—Basis and Derivation,” USDA Handbook 74 (1955). Caloric content also may be calculated on the basis of 4, 4, and 9 calories per gram for protein, carbohydrate, and fat respectively, except that the total dietary fiber shall be subtracted from the total carbohydrate content before calculation of the calories contributed by the

carbohydrate portion of the food. The nondigestible dietary fiber will be determined by the method “Total Dietary Fiber in Foods, Enzymatic Gravimetric Method, First Action,” in the *Journal of the Association of Official Analytical Chemists* (JAOAC), 68:399, 1985, as amended in JAOAC, 69:370 1986 and as modified in JAOAC 71:1017, 1988. Both methods mentioned in paragraph (c)(3) of this section are incorporated by reference in accordance with 5 U.S.C. 552(a). Copies of both methods are available from the Division of Nutrition, Center for Food Safety and Applied Nutrition (HFF-260), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, or available for inspection at the Office of the Federal Register, 1100 L St. NW., Washington, DC.

(i) “Calories from fat”: A statement of the caloric content derived from the total fat content of the food per serving (portion), expressed to the nearest 5-calorie increment up to and including 50 calories, and 10-calorie increment above 50 calories, except that label declaration of “calories from fat” information is not required on products that contain less than one gram fat in a serving (portion). This statement shall be indented under the statement of calories, or, alternatively, calories from fat may be declared adjacent to the statement of fat content and aligned with the statement of total calories, in a column headed “Calories.” If “Calories from fat” is not required and, as a result, not declared, the statement “Not a significant source of calories from fat” shall directly follow the declaration of sodium (or potassium if declared) in the same type size.

(ii) “Calories from saturated fatty acids,” “Calories from unsaturated fatty acids,” “Calories from carbohydrate,” and “Calories from protein” (Voluntary): A statement of the caloric content derived from a serving (portion) of any one or more of the following components may be declared voluntarily: saturated fatty acids, unsaturated fatty acids, total carbohydrate, and protein. Caloric values shall be expressed to the nearest 5-calorie increment up to and including 50 calories and 10-calorie increment above 50 calories.

(A) “Calories from saturated fatty acids” or “Calories from saturated”: A statement of the caloric content derived from saturated fatty acids as defined in paragraph (c)(4)(i) of this section. This statement shall be indented under the statement of calories from fat, or alternatively the calories from saturated fatty acids may be declared adjacent to

the statement of saturated fatty acid content.

(B) "Calories from unsaturated fatty acids" or "Calories from unsaturated": A statement of the caloric content derived from unsaturated fatty acids as defined in paragraph (c)(4)(ii) of this section. This statement shall be indented under the statement of calories from saturated fatty acids, or alternatively the calories from unsaturated fatty acids may be declared adjacent to the statement of unsaturated fatty acid content.

(C) "Calories from carbohydrate": A statement of the caloric content derived from total carbohydrate as calculated in paragraph (c)(6) of this section. This statement shall be indented under the statement of calories from fat, saturated fatty acids, or unsaturated fatty acids, as appropriate; or alternatively calories from carbohydrate may be declared adjacent to the statement of carbohydrate content and aligned with the statement of total calories, in a column headed "Calories."

(D) "Calories from protein": A statement of the caloric content derived from protein as calculated in paragraph (c)(7) of this section. This statement shall be indented under the statement of calories from fat, saturated fatty acids, unsaturated fatty acids, or carbohydrate, as appropriate; or alternatively calories from protein may be declared adjacent to the statement of protein content and aligned with the statement of total calories, in a column headed "Calories."

(4) "Fat content" or "Fat": A statement of the number of grams of total fat in a serving (portion) expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(i) "Saturated fatty acid content," "Saturated fatty acid," or "Saturated": A statement of the number of grams of saturated fatty acid in a serving (portion) calculated as triglycerides and defined as the sum of lauric, myristic, palmitic, and stearic acids, except that label declaration of saturated fatty acid content information is not required for products that contain less than 1 gram of fat in a serving if no claims are made about fat or cholesterol content, and if "calories from saturated fatty acids" is not declared. If a statement of the saturated fatty acid content is not required and, as a result, not declared, the statement "Not a significant source of saturated fatty acid" shall directly follow the declaration of sodium (or potassium if declared) in the same type size. Saturated fatty acid content shall

be indented and expressed as grams per serving to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(ii) "Unsaturated fatty acid content," "Unsaturated fatty acid," or "Unsaturated" (Voluntary): A statement of the number of grams of unsaturated fatty acid in a serving (portion) calculated as triglycerides and defined as the sum of all polyunsaturated and monounsaturated fatty acids (both *cis* and *trans* isomers) may be declared voluntarily, except that when a claim is made on the label or in labeling about fatty acid or cholesterol content or when "calories from unsaturated fatty acid" is declared, label declaration shall be required. Alternatively, separate statements may be declared for polyunsaturated and monounsaturated fatty acids, except that if a claim is made on the label or in labeling about a particular type of unsaturated fatty acid, separate statements shall be declared as follows in lieu of the collective term "Unsaturated":

(A) "Polyunsaturated fatty acid" or "Polyunsaturated": A statement of the number of grams of polyunsaturated fatty acids defined as *cis,cis*-methylene-interrupted polyunsaturated fatty acids, indented and expressed as grams per serving to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative; and

(B) "Monounsaturated fatty acid" or "Monounsaturated": A statement of the number of grams of monounsaturated fatty acids defined as *cis*-monounsaturated fatty acids, indented and expressed as grams per serving to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(5) "Cholesterol content" or "Cholesterol": A statement of the cholesterol content in a serving (portion) expressed in milligrams to the nearest 5-milligram increment, except that label declaration of cholesterol information is not required for products that contain less than 2 milligrams cholesterol in a serving (portion) and make no claim about fat, fatty acids, or cholesterol content, or such products may state the cholesterol content as zero. If cholesterol content is not required and, as a result, not declared, the statement "Not a significant source of cholesterol" shall directly follow the declaration of sodium (or potassium if declared) in the same type size. If the food contains 2 to

5 milligrams of cholesterol per serving (portion), the content may be stated as "less than 5 milligrams."

(6) "Carbohydrate content" or "Carbohydrate": A statement of the number of grams of total digestible carbohydrate in a serving (portion) expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative. Carbohydrate content shall be calculated by subtraction (as described in A. L. Merrill and B. K. Watt, "Energy Value of Foods—Basis and Derivation," USDA Handbook 74 (1955) which is incorporated by reference in accordance with 5 U.S.C. 552(a)). Copies of the reference may be obtained from the Division of Nutrition, Center for Food Safety and Applied Nutrition (HFF-260), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, or available for inspection at the Office of the Federal Register, 1100 L Street NW., Washington, DC.

(i) "Complex carbohydrate content" or "Complex carbohydrate"

(VOLUNTARY): A statement of the number of grams of digestible complex carbohydrate, defined as starches and dextrins, may be declared voluntarily, except that when a claim is made about complex carbohydrate, label declaration shall be required. The amount of complex carbohydrate shall be indented and expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(ii)(A) "Sugars content" or "Sugars" (VOLUNTARY): A statement of the number of grams of sugars in a serving (portion) may be declared, except that when a claim is made on the label or in labeling about sugars or sugar alcohol content, it shall be required in nutrition labeling. Sugars shall be defined as the sum of all free mono- and oligosaccharides through four saccharide units (such as glucose, fructose, lactose, sucrose, and glucose polymers up to four saccharide units) and their derivatives whose use in the food is approved by the Food and Drug Administration (FDA) or is generally recognized as safe that have similar sweetening, nutritional, and metabolic effects (such as sugar alcohols). Sugars content shall be indented and expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(B) "Sugar alcohol content" or "Sugar alcohol" (VOLUNTARY): A statement of the number of grams of sugar alcohols in a serving (portion) may be declared voluntarily on the label, except that when a claim is made on the label or in labeling about sugar alcohol or sugars when sugar alcohols are present in the food, sugar alcohol content shall be declared. For nutrition labeling purposes, sugar alcohols are defined as the sum of mannitol, sorbitol, xylitol, and any other sugar alcohols whose use in the food is approved by FDA or is generally recognized as safe and that meet the definition of sugars as described in paragraph (c)(6)(ii)(A) of this section. Sugar alcohol content shall be indented under sugars content and expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(iii) "Fiber content" or "Fiber": A statement of the number of grams of total dietary fiber in a serving (portion), expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, declaration of dietary fiber is not required or, alternatively, the statement "Contains less than 1 gram" or "less than 1 gram" may be used. If dietary fiber content is not required and as a result, not declared, the statement "Not a significant source of fiber" shall directly follow the declaration of sodium (or potassium if declared) in the same type size.

(A) Soluble and insoluble fiber (VOLUNTARY): A statement of the number of grams of soluble and insoluble dietary fiber in a serving (portion) may be declared voluntarily except that when a claim is made on the label or in labeling about either type of fiber, label declaration of both types shall be required as follows:

(1) "Soluble fiber": A statement of the number of grams of soluble dietary fiber, indented and expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative, and

(2) "Insoluble fiber": A statement of the number of grams of insoluble dietary fiber, indented and expressed to the nearest gram except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative.

(B) Total dietary fiber, soluble and insoluble, content shall be determined by the modified method for total dietary fiber in foods, enzymatic gravimetric method, in JAOAC 1988, as described in

paragraph (c)(3) of this section. These methods are incorporated by reference in accordance with 5 U.S.C. 552(a).

Copies are available from the Division of Nutrition, Center for Food Safety and Applied Nutrition (HFF-280), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, or available for inspection at the Office of the Federal Register, 1100 L Street NW., Washington, DC.

(7) "Protein content" or "Protein": A statement of the number of grams of protein in a serving (portion), expressed to the nearest gram, except that if a serving (portion) contains less than 1 gram, the statement "Contains less than 1 gram" or "less than 1 gram" may be used as an alternative. When the protein in foods represented or purported to be for adults and children 4 or more years of age has a protein quality value that is less than 20 percent of casein or in foods represented or purported to be for infants or children under 4 years of age has a protein quality that is less than 40 percent of casein, the protein content statement shall be modified by an adjacent statement "not a significant source of protein" regardless of the actual amount of protein present. Protein content may be calculated on the basis of the factor of 6.25 times the nitrogen content of the food as determined by the appropriate method of analysis as given in the current edition of the Official Methods of Analysis of the Association of Official Analytical Chemists, which is incorporated by reference, except when the official procedure for a specific food requires another factor. Copies may be obtained from the Association of Official Analytical Chemists, 2200 Wilson Blvd., Suite 400, Arlington, VA 22201-3301, or may be examined at the Office of the Federal Register, 1100 L St. NW., Washington, DC.

(4) A statement of the corrected amount of protein per serving, as determined in paragraph (c)(7)(ii) of this section, calculated as a percentage of the RDI for protein and expressed as "Percent of Daily Value," may be placed on the label, except that such a statement shall be given if a protein claim is made for the product, or if the product is represented or purported to be for use by infants or children under 4 years of age. The percentage of the RDI for protein shall not be declared if the food is represented or purported to be for use by adults and children 4 or more years of age, and the protein quality value is less than 20 percent of casein, or if the food is represented or purported to be for use by infants or children under 4 years of age, and the protein quality value is less than 40 percent of

casein. When such a declaration is provided, it shall be placed on the label adjacent to the statement of grams of protein.

(ii) The "corrected amount of protein (gram) per serving (portion)" is equal to the actual amount of protein (gram) per serving (portion) multiplied by the relative protein quality value. The relative protein quality value shall be determined by dividing the subject food protein quality value by the protein quality value for casein. If the protein quality value of the subject food is equal to or greater than the protein quality value of casein, the relative value shall be set at 1.

(iii) [Reserved].

(8) "Sodium content" or "Sodium": A statement of the number of milligrams of sodium in a specified serving (portion) of food expressed as zero when the serving (portion) contains less than 5 milligrams of sodium, to the nearest 5-milligram increment when the serving (portion) contains 5 to 140 milligrams of sodium, and to the nearest 10-milligram increment when the serving (portion) contains greater than 140 milligrams.

(9) "Potassium content" or "Potassium" (VOLUNTARY): A statement of the number of milligrams of potassium in a specified serving (portion) of food may be declared voluntarily, except that when a claim is made about potassium content, label declaration shall be required. Potassium content shall be expressed as zero when the serving (portion) contains less than 5 milligrams of potassium, to the nearest 5-milligram increment when the serving (portion) contains less than or equal to 140 milligrams of potassium, and to the nearest 10-milligram increment when the serving (portion) contains more than 140 milligrams.

(10) Under the heading "Percent of Daily Value": A statement of the amount per serving (portion) of the vitamins and minerals as described in this paragraph, expressed as a percent of the RDI.

(i) For purposes of declaration of Percent of Daily Value, foods represented or purported to be for use by infants, children less than 4 years of age, pregnant women, or lactating women shall use the RDI's in paragraph (c)(10)(iv) of this section that are specified for the intended group. For foods represented or purported to be for use by both infants and children under 4 years of age, the Percent of Daily Value shall be presented by separate declarations based on the RDI values for infants from birth to 12 months of age and for children under 4 years of age. Similarly, the Percent of Daily Value based on both the RDI values for

pregnant women and for lactating women shall be declared separately on foods represented or purported to be for use by both pregnant and lactating women. When such dual declaration is used on any label, it shall also be included in all labeling, and equal prominence shall be given to both values in all such labeling. All other foods shall use the RDI for adults and children 4 or more years of age.

(ii) The declaration of vitamins and minerals as a percent of the RDI shall include vitamin A, vitamin C, calcium, and iron, in that order, and shall include any of the other vitamins and minerals listed in paragraph (c)(10)(iv) of this section when they are added as a nutrient supplement, or when a claim is made about them. The declaration may also include any of the other vitamins and minerals listed in paragraph (c)(10)(iv) of this section when they are naturally occurring in the food. The additional vitamins and minerals shall be listed in the order established in paragraph (c)(10)(iv) of this section.

(iii) The percentages shall be expressed in 2-percent increments up to and including the 10-percent level, 5-percent increments above 10 percent and up to and including the 50-percent level, and 10-percent increments above the 50-percent level. Vitamins and minerals present in amounts less than 2 percent of the RDI are not required to be declared in nutrition labeling but may be declared by a zero or by the use of an asterisk that refers to another asterisk that is placed at the bottom of the table and that is followed by the statement "Contains less than 2 percent of the Daily Value of this (these) nutrient (nutrients)." If vitamin A, vitamin C, calcium, or iron is omitted, the statement "Not a significant source of \_\_\_\_\_ (listing the vitamins or minerals omitted)" shall directly follow the listing of percentages of the RDI. Any nutrient declared shall appear in the order established in paragraph (c)(10)(iv) of this section.

(iv) [Reserved].

(v) The following synonyms may be added in parentheses immediately following the name of the nutrient or dietary component:

Vitamin C.....	Ascorbic acid
Folate.....	Folic acid
Calories.....	Energy

(11) Under the heading "Nutrition Profile" (VOLUNTARY): A statement of the percent of the Daily Reference Value (DRV) present in a serving (portion) for

food components for which DRV's are given in paragraph (c)(11)(i) of this section may be declared voluntarily, followed by a statement of the DRV for each component. When this information is included in nutrition labeling, the percent and DRV shall be declared for fat, saturated fatty acids, cholesterol, carbohydrate, fiber, and sodium. Unsaturated fatty acids and potassium also may be included.

(i) [Reserved].

(ii) The following format shall be used to present a food product's nutrition profile:

Component	Percent	Daily value
Fat.....		75 g*
Saturated fatty acid.....		25 g*
Cholesterol.....		300 mg
Carbohydrate.....		325 g*
Fiber.....		25 g*
Sodium.....		2,400 mg

\*As part of a 2,350 calorie diet.

(iii) In addition, the percent of the DRV for unsaturated fatty acids may be listed in the Nutrition Profile immediately following saturated fatty acid and the percent of the DRV for potassium immediately following sodium as follows:

Unsaturated fatty acid.....	(percent).....	50 grams*
Potassium.....	(percent).....	3,500 milligrams

(iv) No claim may be made that a food is a significant source of a nutrient or food component unless that nutrient or component is present in the food at a level equal to or in excess of 10 percent of the RDI or the DRV in a serving (portion). No claim may be made that a food is nutritionally superior to another food unless it contains at least 10 percent more of the RDI for protein, vitamins, or minerals or of the DRV for complex carbohydrates, fiber, unsaturated fatty acids, or potassium, or at least 25 percent less on a weight basis for fat, saturated fatty acids, cholesterol, and sodium per serving (portion).

(d) Products with separately packaged ingredients, with assortments of food, or to which other ingredients are added by the user may be labeled as follows:

(1) If a product consists of two or more separately packaged ingredients enclosed in an outer container or of assortments of food (e.g., assorted candy mixtures) in the same package, nutrition labeling of the total product shall be located on the outer container to provide information for the consumer at the point of purchase. However, when

two or more food products are simply combined together in such a manner that no outer container is used, or no outer label is available, each product shall have its own nutrition information, e.g., two boxes taped together or two cans combined in a clear plastic overwrap.

(2) If a food is commonly combined with other ingredients or is cooked or otherwise prepared before eating, and directions for such combination or preparation are provided, another column of figures may be used to declare the nutrient contents on the basis of the food as consumed in the same format required in paragraph (c) of this section for the food alone (e.g., a dry ready-to-eat cereal may be described with one set of Daily Values for the cereal as sold (e.g., per ounce), and another set for the cereal and milk as suggested in the label (e.g., per ounce of cereal and ½ cup of vitamin D fortified whole milk); and a cake mix may be labeled with one set of Daily Values for the dry mix (per serving) and another set for the serving of the final cake when prepared). *Provided*, That the type and quantity of the other ingredients to be added to the product by the user and the specific method of cooking and other preparation shall be specified prominently on the label.

(e) Compliance with this section shall be determined as follows:

(1) A collection of primary containers or units of the same size, type, and style produced under conditions as nearly uniform as possible, designated by a common container code or marking, or in the absence of any common container code or marking, a day's production, constitutes a "lot".

(2) The sample for nutrient analysis shall consist of a composite of 12 subsamples (consumer units), taken one from each of 12 different randomly chosen shipping cases, to be representative of a lot. Unless a particular method of analysis is specified in paragraph (c) of this section, composites shall be analyzed by appropriate methods as given in the 15th edition 1990 of the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC) which is incorporated by reference in accordance with 5 U.S.C. 552(a) or, if no AOAC method is available or appropriate, by other reliable and appropriate analytical procedures. Alternative methods of analysis may be submitted to FDA to determine their acceptability. Copies of the incorporation by reference are available from the Association of Official Analytical Chemists, 2200 Wilson Blvd., Suite 400, Arlington, VA

22201-3301, or available for inspection at the Office of the Federal Register, 1100 L St. NW., Washington, DC.

(3) Two classes of nutrients are defined for purposes of compliance:

(i) Class I. Added nutrients in fortified or fabricated foods.

(ii) Class II. Naturally occurring (indigenous) nutrients. If any ingredient which contains a naturally occurring (indigenous) nutrient is added to a food, the total amount of such nutrient in the final food product is subject to Class II requirements unless the same nutrient is also added.

(4) A food with a label declaration of a vitamin, mineral, dietary fiber, or protein shall be deemed to be misbranded under section 403(a) of the Federal Food, Drug, and Cosmetic Act (the act) unless it meets the following requirements:

(i) *Class I vitamin, mineral, dietary fiber, or protein.* The nutrient content of the composite is at least equal to the value for that nutrient declared on the label.

(ii) *Class II vitamin, mineral, dietary fiber, or protein.* The nutrient content of the composite is at least equal to 80 percent of the value for that nutrient declared on the label. *Provided*, That no regulatory action will be based on a determination of a nutrient value which falls below this level by a factor less than the variability generally recognized for the analytical method used in that food at the level involved.

(5) A food with a label declaration of calories, sugars, fat, saturated fatty acids, cholesterol, or sodium shall be deemed to be misbranded under section 403(a) of the act if the nutrient content of the composite is greater than 20 percent in excess of the value for that nutrient declared on the label.

(6) Reasonable excesses of a vitamin, mineral, protein, complex carbohydrate, fiber, unsaturated fatty acids, or potassium over labeled amounts are acceptable within current good manufacturing practice. Reasonable deficiencies of calories, sugars, fat, saturated fatty acids, cholesterol, or sodium under labeled amounts are acceptable within current good manufacturing practice.

(7) The compliance provisions set forth in paragraphs (e)(1) through (e)(6) of this section do not apply to products for which nutrition labeling is founded on FDA approved data bases and is computed following FDA guideline procedures and that have been handled in accordance with current good manufacturing practice to prevent nutrition loss. FDA approval of a data base shall not be considered granted until the Center for Food Safety and

Applied Nutrition has agreed to all aspects of the data base in writing. The approval will be granted where a clear need is presented (e.g., fresh produce and seafood). Approvals will be in effect for a limited time, e.g., 10 years, and will be eligible for renewal in the absence of significant changes in agricultural or industry practices. Approval requests shall be submitted in accordance with the provisions of § 10.30 of this chapter. Guidance in the use of data bases may be found in the "FDA Nutrition Labeling Manual—A Guide for Using Data Bases," available from the Division of Nutrition, Center for Food Safety and Applied Nutrition (HFF-260), Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

(8) When it is not technologically feasible, or some other circumstance makes it impracticable, for firms to develop adequate nutrient profiles to comply with the requirements of paragraph (c) of this section, FDA may establish by regulation alternative means of compliance or additional exemptions to deal with the situation. Firms in need of such a regulation may submit a petition for initiation of rulemaking proceedings to the Dockets Management Branch in the form established by § 10.30 of this chapter.

(f) Nutrition information provided by a manufacturer or distributor directly to professionals (e.g., physicians, dietitians, educators) may vary from the requirements of this section but shall also contain or have attached to it the nutrition information exactly as required by this section.

(g) The location of nutrition information on a label shall be in compliance with § 101.2.

(h) The following foods are exempt from this section or are subject to special labeling requirements:

(1) Food products bearing no nutrition claim or information on a label or labeling or in advertising and offered for retail sale only by firms that have an annual amount of food sales which is not more than \$500,000 based on the most recent 2-year average of business activities. Where firms have been in business less than 2 years, reasonable estimates must indicate that annual sales will not exceed \$500,000.

(2) Food products provided by restaurants or other food service facilities offering restaurant-type services (e.g., delicatessens, bakeries, feeding facilities in organizations such as schools, colleges, hospitals, and transportation carriers (such as trains and airplanes)).

(3) Food products provided by grocery stores that are offered for sale from:

(i) Self-service food bars (e.g., salad bars), or

(ii) Behind delicatessen or bakery counters.

(4) Foods, other than infant formula, represented or purported to be specifically for infants and toddlers less than 2 years of age shall bear nutrition labeling, except that such labeling shall not include calories from fat or fatty acid and cholesterol content information.

(5) Dietary supplements, except that the labeling of a dietary supplement in food form, e.g., a breakfast cereal, shall conform to the labeling established in paragraph (c) of this section, including the order for listing vitamins and minerals established in paragraph (c)(10)(iv) of this section.

(6) Any food represented for use as the sole item of the diet, except that such foods shall be labeled in compliance with Part 105 of this chapter.

(7) Foods represented for use solely under medical supervision to meet nutritional requirements in specific medical conditions, except that such foods shall be labeled in compliance with Part 105 of this chapter.

(8) Food products shipped in bulk form for use solely in the manufacture of other foods and not for distribution to consumers in such bulk form or container.

(9) Food products that are supplied for institutional food service use only: *Provided*, That the manufacturer or distributor provides the nutrition information required by this section directly to those institutions on a current basis.

(10) Fresh fruits and vegetables in open containers of not more than one dry quart (a container of rigid or semirigid construction which is not closed by lid, wrapper, or otherwise than by an uncolored transparent wrapper which does not obscure the contents). However, any shipping container for the open container shall bear the required nutrition labeling.

(11) Small individually packaged "bite size" pieces of food where the required nutrition information is presented to consumers in accordance with the provision in paragraph (a)(2) of this section for food not in packaged form.

(12) Shell eggs packaged in a carton that has a top lid designed to conform to the shape of the eggs are exempt from outer carton label requirements where the required nutrition information is clearly presented in no less than 1/16-inch type size immediately beneath the carton lid.

(13) The unit containers in a multiunit retail food package where:

(i) The multiunit retail food package labeling contains all nutrition information in accordance with the requirements of this section;

(ii) The unit containers are securely enclosed within and not intended to be separated from the retail package under conditions of retail sale; and

(iii) Each unit container is labeled with the statement "This Unit Not Labeled For Retail Sale" in type size not less than one-sixteenth of an inch in height. The word "Individual" may be used in lieu of or immediately preceding the word "Retail" in the statement.

(i) [Reserved].

#### § 101.13 [Amended].

4. Section 101.13 *Sodium labeling* is amended in paragraphs (a)(5) and (b)(3) by removing "§ 105.69 or".

5. Section 101.25 is amended by revising paragraph (b) and by removing and reserving paragraphs (c) and (d) to read as follows:

#### § 101.25 Labeling of foods in relation to fat and fatty acid and cholesterol content.

(b) A food label or labeling shall include a statement of the cholesterol and fatty acid content of the food in compliance with § 101.9.

(c)-(d) [Reserved].

### PART 105—FOODS FOR SPECIAL DIETARY USE

6. The authority citation for 21 CFR part 105 continues to read as follows:

Authority: Secs. 201, 401, 403, 409, 411, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 341, 343, 348, 350, 371, 376).

7. Section 105.69 is revised to read as follows:

#### § 105.69 Foods used to regulate sodium intake.

If a food purports to be or is represented for special dietary use by man by reason of its use as a means of regulating the intake of sodium or salt (sodium chloride), the label shall bear nutrition labeling in conformance with § 101.9 of this chapter.

Dated: June 5, 1990.

James S. Benson,  
Acting Commissioner of Food and Drugs.

Louis W. Sullivan,  
Secretary of Health and Human Services.

[FR Doc. 90-16728 Filed 7-13-90; 3:14 pm]

BILLING CODE 4160-01-M

### 21 CFR PART 101

[Docket No. 90N-0165]

RIN 0905-AD08

#### Food Labeling; Serving Sizes

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to amend its nutrition labeling regulations (1) To define serving and portion size on the basis of the amount of food commonly consumed per eating occasion by persons 4 years of age or older, by infants, or by children under 4 years of age (toddlers); (2) to require the use of both U.S. and metric measures to declare serving size; (3) to permit the declaration of serving (portion) size in familiar household measures; (4) to permit the optional declaration of nutrient content per 100 grams (or 100 milliliters); and (5) to define a "single-serving container" as that which contains 150 percent or less of the standard serving size for the food product. FDA also is proposing to establish standard serving sizes for 159 food product categories to assure reasonable and uniform serving sizes upon which consumers can make nutrition comparisons among food products.

**DATES:** Written comments by November 16, 1990. The agency is proposing that any final rule that may issue based upon this proposal become effective 1 year following its publication in the Federal Register.

**ADDRESSES:** Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

**FOR FURTHER INFORMATION CONTACT:** Youngmee K. Park, Center for Food Safety and Applied Nutrition (HFE-265), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-485-0089.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

##### A. Overview

In the Federal Register of August 8, 1989 (54 FR 32610), the FDA published an advance notice of proposed rulemaking (ANPRM) that solicited public comment on a wide range of food labeling issues to help the agency determine what, if any, changes in food labeling requirements were necessary to make the food label more useful and

understandable to consumers. On March 7, 1990, Louis W. Sullivan, Secretary of the U.S. Department of Health and Human Services, announced plans for a comprehensive response to the comments on the ANPRM, to be undertaken by FDA. This document is a part of that response.

Elsewhere in this issue of the Federal Register, FDA is proposing to make nutrition labeling mandatory on foods that are a meaningful source of nutrients and to revise the contents of the nutrition label (see the document entitled "Food Labeling; Mandatory Status of Nutrition Labeling and Nutrient Content Revision"). In support of that document, FDA also is proposing in this issue of the Federal Register to establish two sets of reference values—Reference Daily Intakes (RDIs) and Daily Reference Values (DRVs)—for use in declaring nutrient content in nutrition labeling (see the document entitled "Food Labeling; Reference Daily Intakes and Daily Reference Values"). In addition, in this document the agency is proposing to establish standard serving sizes for all food product categories for use in the nutrition label.

The agency is proposing these standard serving sizes to assure that nutrition labels on similar types of foods are consistent, so that consumers will be able to easily and readily make comparisons of nutrient content among products. In addition, FDA expects that standard serving sizes will eliminate some of the problems that occur when manufacturers manipulate serving sizes to make a product appear, for example, lower in calories or lower in sodium than it would if a more objective serving size were used. FDA also is proposing to clarify what constitutes a "single-serving" to eliminate discrepancies in the marketplace that are confusing to consumers.

FDA is proposing to establish these standardized serving sizes under sections 201(n), 403(a), and 701(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(n), 343(a), and 371(a)) (the act). Sections 201(n) and 403(a) of the act provide that a food's label is misleading, and that a food is accordingly misbranded if the label fails to reveal information that is material with respect to consequences which may result from the use of the food. The serving size is a material fact because it is the fundamental component of nutrition labeling. If nutrition labeling sets out the consequences that may result from consumption of a food, the serving size defines one of the essential

conditions of that consumption by specifying the amount of food that is customarily eaten at one time. The nutrition label sets out the levels of nutrients and other food components that are found in that amount of the food. The consumer uses those levels to evaluate the nutritional value of the food, its overall contribution to the diet, and how it compares with other similar foods. Thus, as is explained in more detail below, a reasonable, standardized serving size is necessary if the labeling of the food is to be informative and not misleading.

### B. Background

In the Federal Register of March 30, 1972 (37 FR 6493), FDA proposed to establish a regulation on nutrition labeling, 21 CFR 1.16 (redesignated as 21 CFR 1.17 in the final rule and recodified as 21 CFR 101.9 (§ 101.9) in the Federal Register of March 15, 1977 (42 FR 14302)). The agency proposed to require that all nutrient quantities, including vitamins, minerals, calories, protein, fat, and carbohydrate, be declared in relation to the average or usual serving expressed in common household measurements (e.g., cupfuls or teaspoonfuls) or in terms of a unit that is easily identified as an average or usual serving (e.g., 12 fluid ounces of soft drinks). All who commented recognized the need for serving sizes applicable to nutrition labeling and recommended that FDA establish them (38 FR 2125; January 19, 1973).

After considering the comments and other available information, FDA issued a final rule in the Federal Register of January 19, 1973 (38 FR 2125), as amended (38 FR 6951; March 14, 1973) establishing nutrition labeling regulations. These regulations defined the terms "serving" and "portion" as:

that reasonable quantity of food suited for or practicable of consumption as part of a meal by an adult male engaged in light physical activity, or by an infant or child under 4 years of age when the article purports or is represented to be for consumption by an infant or child under 4 years of age. The term "portion" means the amount of a food customarily used only as an ingredient in the preparation of a meal component (e.g., ½ cup flour, ½ tablespoon cooking oil or ¼ cup tomato paste).

(21 CFR 1.17(b)(1) (recodified as 21 CFR 101.9(b)(1) in the Federal Register of March 15, 1977 (42 FR 14302))).

FDA also provided for the use of these terms as the basis for declaring nutrition information by requiring that:

A label statement regarding a serving (portion) shall be in terms of a convenient unit of such food or a convenient unit of

measure that can be easily identified as an average or usual serving (portion) and can be readily understood by purchasers of such food (e.g., a serving (portion) may be expressed in slices, cookies, or wafers; or in terms of ounces, fluid ounces, teaspoonfuls, tablespoonfuls, or cupfuls).

(21 CFR 1.17(b)(1) (recodified as 21 CFR 101.9(b)(1) in the Federal Register of March 15, 1977 (42 FR 14303))).

In addition, FDA required the declaration of nutrient quantities on the basis of the food as packaged, that is, declaration of the nutrient values of, for example, 1 oz of dry cereal. The agency concluded that requiring nutrient declaration on the basis of the product as consumed was not feasible because, for many products, there are numerous variations of cooking or other methods of preparation, and therefore such a requirement would be unenforceable (38 FR 6951 at 6953). However, in response to comments, FDA permitted manufacturers to declare, in a separate column, the nutrient quantities on the basis of the food as consumed after cooking or other preparation, provided that the specific method of cooking or other preparation was prominently disclosed on the label, that is, declaration of the nutrient values of, for example, 1 oz of dry cereal plus milk (21 CFR 1.17(b)(3) (recodified as 21 CFR 101.9(b)(3) in the Federal Register of March 15, 1977 (42 FR 14303))).

While FDA agreed with the comments that serving or portion size should be uniform, it did not attempt to establish such uniform serving or portion sizes at that time. Instead, FDA stated that "[u]nder the regulation, it is incumbent upon industry and consumers to work together to devise uniform serving and portion sizes" (38 FR 6951 at 6953), and that "[i]f this does not materialize the Commissioner will establish a procedure for adopting uniform serving and portion sizes that will be applicable to all foods" (38 FR 6951 at 6953).

On June 14, 1974 (39 FR 20887), FDA proposed to establish (1) General principles governing the establishment of a serving or portion size, (2) a petition process by which manufacturers could establish or amend a serving or portion size, and (3) serving sizes for noncarbonated breakfast beverage products (6 fl oz), formulated meal replacements (amount intended for a meal when reconstituted for consumption), ready-to-eat breakfast cereal (1 oz or the amount in a single-serving container), hot breakfast cereal (1 oz, uncooked), and fluid milk beverages (8 oz serving or 1 quart on a daily basis). In that document, FDA also proposed to clarify that the term "portion" was intended to be used as a

basis for nutrition labeling only for foods not eaten directly but eaten only as an ingredient of other foods. FDA tentatively concluded that this clarification was necessary to avoid the consumer confusion that had resulted from manufacturers improperly using this term for foods, e.g., canned peaches, canned green beans, and canned tuna, that are obviously eaten alone frequently and for which a statement of the serving size rather than portion size is required. (The agency later withdrew this proposal as part of a blanket withdrawal of a number of proposed rules related to various food products that FDA had published in the Federal Register before 1977. The agency's decision to withdraw these proposals was based on its limited resources to complete these rulemaking proceedings and on the likelihood that they had become outdated since their publication (51 FR 15653; April 25, 1986).)

On June 9, 1978 (43 FR 25296), FDA, the U.S. Department of Agriculture (USDA), and the Federal Trade Commission (FTC) announced a series of public hearings to discuss several issues related to food labeling, including nutrition labeling. Based on their analysis and evaluation of the oral and written comments that they received on the announcement, the three agencies announced their tentative positions on several issues, including serving sizes, on December 21, 1979 (44 FR 75990).

The agencies stated that although serving size was not a major issue in the hearings and in written comments, those comments that did address this issue implied that the public would welcome standardization of serving sizes. Because serving size information is important in meaningful nutrition labeling, because of their commitment to make uniform serving sizes for some foods, and because industry had failed to set useful serving sizes in many cases, FDA and USDA stated that they had concluded that serving sizes should be established for foods needing them. However, neither USDA nor FDA took action on this conclusion.

### C. Need for Change in Procedure for Establishing Serving Size

Serving sizes act as the basis for providing nutrition information about a food product to consumers. If a serving size is unreasonably large or small, it can distort the nutrition information provided on the food label and impede understanding of the nutritional quality of a product. Moreover, large variations in the serving sizes of like products make comparison of nutrients difficult.

Since 1973, there has been support among consumer and professional groups and some manufacturers and trade associations for the standardization of serving sizes (38 FR 2125, January 19, 1973). On several occasions, FDA has stated that reasonable and uniform serving sizes should be used and has expressed its intention to develop a procedure for standardizing serving sizes. The agency in 1974 (39 FR 20887) stated that it would propose serving sizes on its own initiative if divergent serving sizes continued to be used in the marketplace. More recently, comments on the 1989 ANPRM and in the food labeling hearings expressed strong concern about serving sizes.

#### D. FDA's Response to Need for Change

In view of the many comments from the recent food labeling hearings and comments made to the ANPRM about the need for more realistic and consistent serving sizes, FDA has tentatively concluded that reasonable and standardized serving sizes should be established. The agency, therefore, is proposing to establish a new regulation, § 101.12 (21 CFR 101.12), that sets forth standard serving sizes for 159 food product categories for nutrition labeling and other food labeling purposes. FDA intends to use these standard serving sizes, if they are adopted, to evaluate whether claims on food labels, such as "low sodium" and "low cholesterol," are appropriate and not misleading to consumers.

#### II. Comments

The ANPRM on food labeling (54 FR 32610; August 8, 1989) requested public comment on what criteria should be used in determining serving sizes for nutrition labeling. Specifically, FDA sought comment on whether serving sizes should be determined by FDA by regulation or by manufacturers following criteria established by FDA, or whether serving sizes should not be included on the nutrition label. In response, the agency received numerous comments on how serving sizes should be determined and presented on the food label. The agency has attempted to address the comments in this proposal. If there are any significant concerns that the agency has not addressed, these concerns should be brought to the agency's attention in comments on this proposal.

The agency will describe the comments that it received on serving sizes in more detail and respond to them as it considers each of the specific issues that they raised.

#### III. Development of Proposed Action on Serving Size

##### A. Regulatory Approach

As stated above, the serving size is the amount of a food that is used as the basis for presenting the food's nutrient content to the public. In deciding how serving sizes should be determined, the agency considered the purposes and uses of serving sizes, as well as the comments on serving size that it received in response to the ANPRM and its experience over the past 20 years in regulating nutrition information on food products. Based on its consideration of these factors, the agency reached a set of tentative conclusions about serving sizes. Frequently, it was not possible to meet all potential goals for the purposes and uses of serving sizes. When conflicts arose, priority was given to the option that FDA considered to be most useful to consumers.

##### 1. Reasonable Serving Sizes

One purpose of the serving size is to provide an appropriate and usable reference point for evaluating the nutritional content of the food itself. To be an appropriate reference point, the serving size must include a meaningful quantity of food. Several comments pointed out that in the absence of limits on the amount of food in a serving, manufacturers had manipulated serving sizes on their products to achieve a per serving content that would allow claims such as "low calorie" or "low sodium" that made their products appear nutritionally superior relative to other products in light of public health concerns.

Both FDA's current and proposed definitions of "serving size" focus on the quantity of food commonly consumed per eating occasion. Many comments suggested that serving sizes of food should represent a reasonable average amount. Several comments further suggested that the determination of what is a reasonable average amount should be based on food consumption data in national surveys, such as the National Health and Nutrition Examination Survey (NHANES), which is conducted by the National Center for Health Statistics, or the Nationwide Food Consumption Survey (NFCS) and the Continuing Survey of Food Intakes by Individuals (CSFII), which are conducted by USDA. Several comments suggested that FDA should use the serving sizes in standard exchange lists that are widely used for diabetic and other special diets. Other comments suggested that FDA use the serving sizes in standard food composition references such as USDA Agriculture Handbook

No. 8 (Ref. 1) or those recommended in Government publications that offer dietary guidance (Refs. 2 and 3).

FDA agrees that serving sizes should represent reasonable average amounts that are commonly consumed. To reflect this fact, the agency tentatively concludes that the serving size for a particular food should be the amount that is commonly consumed by the population group for which the food is intended. FDA believes that use of the average amount consumed by a reference population group is more realistic for the purpose of establishing standard serving sizes that is the use of: (1) Food exchange lists, which have been developed for therapeutic diets and therefore may not represent the usual or average amount consumed in an eating occasion; (2) a type of person, such as the adult male, who would not be representative of the average target population; or (3) standard units in Government publications which were not designed necessarily to represent usual serving sizes.

Comments indicated that to be a useful reference point, the serving size should be expressed in units that are readily understood by consumers. Most of the comments recommended the use of familiar units, such as count, pieces, package, and household measures (e.g., cups or tablespoons). Several comments requested that manufacturers also be permitted to declare serving size by weight (e.g., oz) as well as household measures. Other comments, citing international harmonization in food labeling, recommended the use of metric units for weights and volume, with 100 grams (g) or 100 milliliters (mL) as the basis for providing nutrition information on most foods and 10 g or 10 mL on foods consumed in small amounts. Several comments cautioned, however, that consumers in the U.S. do not understand metric units and asserted that they therefore should not be required.

FDA recognizes that most consumers prefer the use of familiar household units such as count, pieces, cups, slices, and tablespoons. In responding to these comments, the agency initially considered requiring serving sizes in familiar household units, followed in parentheses by the equivalent metric measurement. However, it quickly became clear to the agency that the variability in size and weight of various food products (e.g., lack of standardization in bread size and in thickness of slices) would mean that for many products, this approach would create compliance problems and would

make it difficult for consumers to make comparisons among similar products.

Therefore, to establish a basis for serving sizes that ensures that they will readily lend themselves to consumer comparisons and to agency compliance needs, FDA tentatively concludes that for most foods, manufacturers should be required to list on the label the standard serving size in U.S. units, such as oz or fluid ounces (fl oz), followed by the equivalent metric measurements (mL) in parentheses. As an example, the serving size for fluid milk should be described as "8 fl oz (240 mL)" and for bread as "2 oz (56 g)." FDA believes, however, that there are a few foods, for which exceptions to this general approach should be made, e.g., catsup, and for which familiar household units, such as tablespoons, are more appropriate and enforceable and therefore should be required. A discussion of these exceptions, and of FDA's rationale for proposing to require that the standard serving size for these products be declared in this manner, appears later in this document.

To be responsive to the many comments that requested that serving sizes be expressed in familiar household units, FDA also tentatively concludes that manufacturers should be permitted voluntarily to declare the serving size in terms of familiar household measures, such as cups, pieces, or count. Thus, in addition to declaring the serving size for fluid milk as "8 fl oz (240 mL)," the manufacturer could add "1 cup." Similarly for bread, a manufacturer could declare "2 oz (56 g) (2 slices)" or "about 2 [or 1 or 3] slices" for breads for which 2 slices varies significantly from the 2-ounce (56 grams) standard serving size. Because of the general support from comments for the use of familiar household units, FDA especially requests comments on the proposed required approach of primarily using weight or volume measures (i.e., oz, fl oz) as the basis for determining the standard serving size used in nutrition labeling.

FDA also tentatively concludes that nutrient declaration per 100 grams (or 100 milliliters) should not be required at this time. U.S. consumers are not as familiar with the metric system as consumers in other countries and, as stated above, have expressed strong preference for familiar units. However, because FDA wishes to support international harmonization in food labeling, FDA tentatively concludes that it will permit manufacturers to voluntarily provide nutrition information on the basis of 100 g or 100 mL in addition to the required information.

(See also section III.B.3. of this document.)

## 2. Standardized Serving Sizes

The second purpose of the serving size is to provide a means by which consumers can make comparisons between foods. Many comments pointed out that a major impediment to effective consumer use of nutrition labeling information has been the multiplicity of serving sizes, including, in particular, those used on foods that are sold in obviously single-serving containers. The comments cited a number of examples that depicted misleading serving sizes. These examples included: (1) Multiple servings declared on container sizes that are typically consumed as single servings; (2) 1-oz servings on products commonly consumed in larger amounts; (3) 1-oz servings on foods when a slice or other apparent serving or portion is more than the 1 oz declared; and (4) unrealistically large or small serving sizes for some products. The comments argued that to permit consumers to readily compare the relative nutritional contributions of various foods, serving sizes must be standardized.

FDA recognizes the merits of these comments. As a result of its consideration of these comments, the agency tentatively concludes that standardized serving sizes should be established to provide consumers with a more realistic means for making food comparisons.

Standard serving sizes facilitate comparison of the nutritional values of foods that are the same types of products and that have similar uses in the diet. For example, they permit comparisons to be made among potato chips, corn chips, and pretzels consumed as snacks, as well as comparisons among different brands of the same food and between single and multiple serving packages or containers, so long as the serving sizes are based on the same unit of measurement. Many of the comments stated that this uniformity in serving size within each product class is essential if consumers are to make meaningful comparisons among competing foods.

The ability to make comparisons among products is important to assist consumers to change their food consumption patterns to conform to dietary guidelines such as the National Academy of Sciences' report on "Diet and Health, Implications for Reducing Chronic Disease Risk" (Ref. 4), "Nutrition and Your Health, Dietary Guidelines for Americans" (Ref. 5), and "The Surgeon General's Report on Nutrition and Health" (Ref. 6). These guidelines frequently suggest increasing

the intake of one type of food (e.g., skim milk) while reducing the intakes of other foods (e.g., whole milk) as a means of meeting dietary guidelines such as reduced fat intake. Thus, a common basis for direct comparisons among different types of foods, as well as among similar types of foods, is helpful to consumers wishing to change their dietary choices and patterns to be more consistent with recent dietary recommendations.

The ability to make comparisons also facilitates FDA's enforcement of various provisions of its labeling regulations. Such comparisons provide a ready means of determining whether a substitute food is nutritionally inferior to the food that it resembles (21 CFR 101.3). Moreover, it provides a means of ensuring that adjectival descriptors (e.g., "reduced sodium") actually describe the nutritional quality of the food and not just a change in serving size.

For all these reasons, FDA tentatively concludes that serving sizes should be standardized by specific units of measurement.

## 3. Conclusion

Therefore, FDA tentatively concludes that serving sizes should be based on the average level of consumption by the population groups for which the food is intended, be declared in both U.S. and metric measures, and be standardized based on those units. In developing a regulation that reflects these conclusions, the agency considered three other factors:

a. Given its current efforts to harmonize labeling practices with Canada, the European community, and other members of the Codex Alimentarius Commission to facilitate international trade, the agency sought to formulate standards for serving sizes that are as consistent as possible with international practices.

b. To maintain flexibility in the package and container sizes that can be used by industry, the agency sought to develop a regulatory scheme that takes into account the fact that FDA cannot mandate standardized containers. Manufacturers have had a long history of using unique types of packages for their products. For this reason, several comments expressed concern that unnecessary changes in serving size requirements would affect flexibility in packaging, could damage product identification, and could place a considerable burden on the manufacturer.

c. To maintain flexibility for changing, revising, and updating serving sizes as changes occur in dietary patterns of the

U.S. population and as food products in the marketplace change, the agency tentatively decided, as will be discussed in detail later in this document, to provide for a mechanism by which standardized serving sizes could be modified or could be developed for new classes of food.

### B. Regulatory Options

FDA identified five possible options for implementing its tentative conclusions on serving sizes. These options were as follows: (1) Maintain the current system in which manufacturers develop their own serving sizes; (2) allow manufacturers to develop their own serving size using criteria and procedures established by FDA; (3) adopt a single uniform serving size for all products, e.g., 100 g (or 100 mL) or 1 oz (28 g); (4) develop standard serving sizes on a food-by-food basis that are derived from nationally representative food consumption surveys and also include a petition process to provide a mechanism by which interested parties can add to or amend the standard serving sizes; and (5) use some combination of approaches, e.g., dual labeling of nutrition information based on two different serving size approaches. There are advantages and disadvantages to each of these options. Although FDA has tentatively chosen option 4, the agency solicits comments on which option will best serve the goals previously discussed.

#### 1. Manufacturers Establish Serving Size

The first option, to permit manufacturers to establish their own serving sizes, obviously provides maximum flexibility for the food industry. Most of the food industry comments preferred this approach. However, this approach would provide little likelihood that any of the agency's other tentative conclusions would be met. For example, such an approach would not address the large number of concerns expressed by consumers about the confusion engendered by multiplicity of serving sizes in the marketplace. Furthermore, FDA believes that, given its proposal to make nutrition labeling mandatory on most foods, standard serving sizes will, in fact, be useful to manufacturers, especially in developing labels for products not previously labeled.

#### 2. FDA Develop Criteria for Establishing Serving Size

The second option, to permit manufacturers to develop their own serving sizes by applying criteria established by FDA, was FDA's first

choice when work began on this proposal. Several comments on the ANPRM, including some from industry, supported this option. The agency believed that while this option might not produce standardized serving sizes, there would be enough similarity in serving sizes to permit comparison of values for nutrients within the same types of products having similar usage. By basing the criteria and procedures on available and appropriate food consumption data bases, FDA also anticipated that manufacturers could obtain serving sizes that approximated average consumed intakes. The agency intended to make standardization of declaration units part of the criteria. The agency believed that this option would provide flexibility for manufacturers and not be a particular burden for the agency.

FDA, however, ran into major problems in attempting to develop criteria and procedures to implement this option. After defining what seemed to be reasonable criteria and procedures for using available data bases to estimate the average consumed serving sizes, which are described below, FDA tried to calculate serving sizes for several foods to evaluate the usefulness of the draft criteria and procedures. What quickly became apparent was that the food consumption data bases could be used as a starting point and as a guide, but that numerous problems still had to be addressed, almost on a food-by-food basis, in arriving at a usable serving size for nutrition labeling purposes. Because of these problems, FDA has tentatively concluded that it is not possible to develop criteria or detailed enough guidelines to ensure that manufacturers and others using the same data bases and same set of instructions would necessarily come up with the same or even similar serving sizes.

Three examples can be given to illustrate the problems with establishing general criteria and procedures.

Example 1: Standard Serving Size for Frozen Desserts. FDA grouped ice cream, ice milk, frozen yogurt and sherbet together because they are frozen desserts that can be substituted for each other. Because of the variability in intakes among the four groups in the most recent (1977 and 1978) USDA Nationwide Food Consumption Survey (NFCs), the data base used by the agency, FDA considered the median as well as the mean in setting the standard serving size for this food group.

Food Group	Mean	Median
	(cup)	(cup)
Ice cream.....	0.8	0.8
Ice milk.....	0.8	0.7
Frozen yogurt.....	0.6	0.5
Sherbet.....	0.8	0.8

After considering all of these values, the agency determined that the reasonable serving size for these products is 0.75 or  $\frac{3}{4}$  cup. However, because some products in this category are sold in distinct shapes (e.g., bars or sandwiches) and cannot be measured in a cup, FDA set the standard serving size at 6 fl oz which is equivalent to  $\frac{3}{4}$  cup.

Example 2: Standard Serving Size for Coffee. FDA considered both the mean and median intakes in setting a standard serving for coffee. The mean consumed serving size per eating occasion for coffee was 11 fl oz, and the median consumed serving was 8 fl oz. Because multiple servings of coffee are commonly consumed per eating occasion, and because many coffee cups hold 8 fl oz, FDA determined that the median 8 fl oz is more reasonable as the standard serving size for coffee than the mean consumed serving size.

Example 3: Standard Serving Size for Stews, Soups, and Dinners for Toddlers. Stews, soups, and dinners for toddlers were not reported in the 1977 and 1978 NFCs but are in the marketplace today. The average amount of similar items consumed by toddlers in the NFCs was 6 oz, which is the manufacturers' suggested serving size on labels of these toddler foods. Therefore, FDA determined that 6 oz is the appropriate standard serving size for toddler stews, soups, and dinners.

As can be seen in the above examples, the food consumption survey data did not necessarily provide information that led to a single reasonable serving size for products that are used interchangeably in the diet. Generally, a decision had to be made for each product category as to what is the most reasonable serving size.

Thus, FDA did not select this option because of its inability to develop criteria and procedures that are detailed enough to ensure that uniform serving sizes for similar products would result from their use. However, because of the many advantages of this option, FDA requests comments on criteria that would ensure uniform serving sizes.

#### 3. FDA Adopt a Single, Uniform Serving Size

The third option, to adopt a uniform serving size for all products, e.g., 100 g (or 100 mL) or 1 oz (28 g), has the

advantage of being simple, straightforward, and easy to develop, implement, and monitor. It would allow comparisons of nutritional value across all foods on an equal weight basis. The 100 g (or 100 mL) basis would provide harmonization with many other countries, thus facilitating international free trade (Refs. 7 and 8). A major disadvantage of this approach is that foods are not necessarily consumed in 100 g or 1 oz quantities, and it does not respond to the strong consumer sentiment expressed to FDA that nutrition information should relate to commonly consumed amounts. FDA also has taken into consideration consumer experience and understanding in determining the most effective basis for nutrient declaration. In 1981, FDA conducted a survey of consumers, nutritionists, and food industry representatives concerning what nutrition information they thought should be included in food labels to make those labels most useful to consumers in improving nutritional status and reducing dietary health problems. All groups of respondents preferred having nutrition information continue to be presented on a per serving basis rather than per 100 calories or per 100 g (Ref. 9).

Moreover a metric value (100 g), rather than 1 oz, as the basis for standardization would be confusing to many American consumers. Use of 1 oz, on the other hand, would do nothing to facilitate trade.

For all these reasons, FDA has tentatively concluded not to put forward this option. Because of its potential usefulness, however, FDA requests comments on ways to make this approach more meaningful to consumers.

#### 4. FDA Establish Standard Serving Sizes With a Petition Process

The fourth option, to have FDA develop standard serving sizes with a petition process to provide a mechanism by which interested parties could add to or amend the established serving sizes, is the basic approach incorporated in this document.

Many comments stated that uniformity in serving size within each product class is essential to allow consumers to make meaningful comparisons among competing foods. Several industry comments requested that FDA not adopt this option until it had received substantial input from the affected industry.

FDA is publishing as part of this regulation, proposed standard serving sizes for 159 food product categories (see proposed § 101.12(b), Tables 1 and

2). These product categories cover virtually all of the foods reported as being consumed by the U.S. population in the NFCS of 1977 and 1978 (Ref. 10). FDA also has added several serving sizes for newer foods in the marketplace that were not available at the time of that survey.

This approach is consistent with most of the agency's tentative conclusions with respect to serving size. It maximizes standardization for declaration of nutrition labeling information for most foods that are similar in type and in dietary usage, and it also standardizes the bases for nutrition claims across all foods that are similar in type and usage. At the same time, under this approach, manufacturers have maximum flexibility in establishing container or package sizes, including single-serving containers, but have reduced motivation for "manipulating" these sizes to be able to make positive nutrition claims. Because this approach is directly linked to food consumption data bases, serving sizes developed under this approach will be based on the amount commonly consumed per eating occasion as reported by NFCS survey respondents and thus will meet the objective that serving size be based on a reasonable quantity of food.

Moreover, the agency is providing for a petition process to add to or amend the standardized serving sizes. While the petition process may be time-consuming, the need to update the listing of serving sizes should be minimal. The food product categories, as described, represent virtually all foods reported in the 1977-1978 NFCS as well as all food products currently in major supermarkets. The need for changes in standard serving sizes can be evaluated periodically as new food consumption data become available.

A major disadvantage of this approach is that serving sizes will differ by type of product, and thus comparison of nutritional value across a broad range of products will be limited. However, the agency has tried to minimize the significance of this factor by using oz for units as consistently as possible for all serving sizes. The other disadvantage is that this option will not be consistent with international practices, and thus it will not facilitate free trade.

FDA urges consumers, health professionals and their professional societies, and the various food industries and their associations to provide comments and suggestions in response to the approach the agency is taking. FDA will give all comments careful consideration in developing any final rule based on this proposal.

#### 5. Dual Declaration Based on Standard Serving Sizes and a Uniform Serving Size

A fifth option to permit manufacturers to use dual declaration of nutrition information on the basis of both standard serving sizes developed by FDA and a uniform 100 g (or 100 mL) serving, is proposed in this document as an option for manufacturers. The agency has included the 100 g (or 100 mL) serving size, rather than 1 oz (or its equivalent), as the optional second mode of declaration because of its utility in international trade, where declaration on a metric basis is already the common practice, and because of the ease in calculating percentages for fractional units.

While this option would effectively meet virtually all of the agency's objectives for serving sizes, dual declaration of nutrition information on the basis of both a standardized and a uniform 100 g (or 100 mL) serving size would also effectively double the amount of nutrition information per container. Given the large amount of nutrition information proposed for inclusion on the label, the agency has decided not to propose to make this dual declaration mandatory but requests comments on whether it should be made mandatory on some or all foods. The agency intends to test the ability of consumers to use dual declaration as part of the testing of formats for nutrition labeling that the agency will conduct as part of this food labeling initiative.

Although not proposed, several alternative approaches for dual declaration are also possible. One alternative would be to allow manufacturers to set their own serving sizes but to require a 100 g declaration to provide a basis for comparisons across different types of products. This approach is analogous to the current common practice of many retail stores of providing shelf labeling information on container and unit costs of products. Consumers' acceptance of, and ability to understand, unit pricing information suggests that consumers may likewise be able to understand and be able to benefit from nutrition and other food label information based upon a standardized unit declaration. The agency specifically requests comments on the usefulness of such an approach.

Additional information about consumer experience with, and response to, unit pricing could provide valuable insights into the effects of the various options under consideration. For example, has unit pricing led to any

desirable or undesirable outcomes in terms of product quality or in other ways? Are there important differences between food and nonfood items with respect to these effects? FDA seeks comments on the applicability of the unit pricing experience analogy to nutritional information, as well as any supporting data and studies. FDA plans to incorporate all useful information into its analysis of the options being considered.

Another alternative would be to have the uniform serving size be based on 1 oz rather than in metric units. This approach also would accommodate consumers' negative reactions to use of metric units. FDA requests comments on the concept of dual declaration of nutrition information and on how this approach could be developed.

#### IV. The Proposed Regulation

##### A. General Description

##### 1. Introduction

The agency is proposing in § 101.9(b) to retain the current requirement that nutrition information in the labeling of food be declared in relation to a serving or, where the food is customarily not consumed directly, in relation to a portion of the food. Likewise, the agency is retaining current § 101.9(b)(2), redesignated as § 101.9(b)(4), which defines standard household measures.

Section 101.9(b) currently allows for the optional use of a column of figures to declare nutritional information in relation to the average or usual amount of the food consumed on a daily basis. The agency is not aware of any food labels other than some brands of breads and muffins, that take advantage of this part of the regulation, and, therefore, to simplify the regulation, FDA is proposing to delete this provision.

In contrast, § 101.9(b)(3), which provides for the use of an additional column of figures to declare nutrient information on the basis of the food as consumed, is used extensively for foods that are combined with other ingredients or that are cooked or otherwise prepared before consumption (e.g., cake and other dry mixes and breakfast cereals). Inasmuch as current § 101.9(b)(3) is repetitive of current § 101.9(d)(2), and because this issue is not directly related to serving size, the agency is proposing in the document entitled "Food Labeling: Mandatory Status of Nutrition Labeling and Nutrient Content Revision," published elsewhere in this issue of the Federal Register, to modify § 101.9(d)(2) to incorporate the provisions of both paragraphs to allow manufacturers to voluntarily declare an additional column

of figures on the basis of the food as consumed. Therefore, FDA proposes to delete § 101.9(b)(3).

##### 2. Definition of Serving (Portion) Size

FDA is proposing definitions for the terms "serving" (or "serving size") and "portion" in § 101.9(b)(1). The current definition of "serving size" states that it is "the reasonable quantity of food suited for or practicable of consumption as part of a meal by an adult male engaged in light physical activity, or by an infant or child under 4 years of age when the article purports or is represented to be for consumption by an infant or child under 4 years of age." The agency is proposing to modify the definition in two ways.

First, the agency is proposing to define "serving size" as "that amount commonly consumed per eating occasion" by the target population. The agency's approach in this regulation, as in the companion document on RDI's and DRV's, is to calculate values on a population weighted average, rather than on the basis of the adult male. Second, by focusing in the proposed definition on the "amount commonly consumed," the agency is proposing to link the amount of the serving size to objective measures of average serving sizes as reported in appropriate food consumption surveys. This approach is consistent with several comments from the recent food labeling hearings that supported the use of food consumption survey data for establishing serving sizes. In contrast to the proposed approach, the current definition uses the terms "reasonable" and "practicable" to describe the quantity of food that constitutes the serving but does not define those terms.

FDA is proposing in § 101.9(b)(1) to modify the definition of "portion" to state that it is the amount of a food customarily used only as an ingredient in the preparation of "other foods," rather than of "a meal component." This change clarifies that the use of the term "portion" need not be tied to a component of a specific meal. The agency is proposing to establish in § 101.12(b) standard portion sizes for foods that are used primarily as ingredients to assure uniformity for classes of products.

##### 3. Description of Serving Size

a. *Single-serving container.* FDA is proposing in § 101.9(b)(2) that a package containing 150 percent or less of the standard serving size specified in Tables 1 or 2 is a single-serving container. FDA is proposing the cutoff level of 150 percent or less based on a survey conducted by FDA in the Washington,

DC area and on FDA's Food Label and Package Survey (Ref. 15). These surveys revealed that 150 percent of the standard serving size covers almost all packages whose contents are likely to be consumed at a single eating occasion. The agency also considers the 150 percent cutoff level to be appropriate for defining single-serving packages because it is well within the one standard deviation of the mean consumed serving size for most product categories.

The agency is also proposing to require that for single-serving containers, the unit of the container, e.g., bar, box, carton, dinner, package, or pouch, be declared as the serving size. Thus, the serving size should be the same as the net weight or volume of the package.

b. *Units of measure used in serving size.* FDA is proposing in § 101.9(b)(3) that the serving size be identified in nutrition labeling as that amount specified in column 1 of Tables 1 and 2 of proposed § 101.12(b). The agency is proposing that the metric weight or volume (see column 2 in Tables 1 and 2) be included, for compliance purposes, in parentheses after the serving size.

For some food product categories, the weight of the standard serving size for individual products within the group can vary depending upon the density of the product. For example, the standard serving size for ice creams and frozen yogurts is proposed in column 1 of Table 2 to be 6-fluid ounces (equivalent to  $\frac{3}{4}$  cup). The weight for  $\frac{3}{4}$  cup of ice cream is usually about 100 g, while the weight of  $\frac{3}{4}$  cup of many frozen yogurts is 145 g. Each of these foods can vary greatly depending upon the amount of air incorporated during manufacture into the product. When density varies within a food group, the metric quantity is left blank in Tables 1 and 2. In these situations, under the proposed rule manufacturers will be required to provide the g weight of a standard serving size of their product. FDA can check nutrient content most accurately on the basis of g weight. Moreover, declaration of metric quantity will facilitate international trade. Therefore, the agency has tentatively concluded that metric quantity is an essential part of the serving size.

FDA also is proposing in § 101.9(b)(3) to permit manufacturers to voluntarily declare the serving size in familiar household measures (column 3 in Tables 1 and 2) following the required declaration in U.S. and metric units. This action responds to the many comments that expressed preference for the use of household measures.

c. *Declaration of number of servings per container.* FDA is proposing in § 101.9(b)(5) that the label of a package or container (other than a single-serving container) declare the number of servings to the nearest 0.5 servings. FDA is proposing to require the rounding of number of servings, where necessary, and that this rounding may be indicated by the use of the term "about" before the number of servings. FDA has tentatively concluded that this requirement will help reduce the number of fractional servings declared on nutrition labeling and help reduce consumer confusion. Comments on the ANPRM indicated that consumers do not know how to deal with nutrition labeling claiming 2% or 1.4 servings per container.

d. *Listing of nutrient contents based on 100 grams or 100 milliliters (voluntary).* FDA is proposing in § 101.9(b)(6) to retain the requirement in current § 101.9(b)(3) that nutrient quantities be declared on the basis of the food as packaged. FDA also is proposing in this paragraph to permit, in a separate, additional column, the voluntary declaration of nutrient and other food component information on the basis of 100 g of the product.

## B. Proposed Serving (Portion) Sizes

### 1. Introduction

FDA is proposing to adopt a new regulation, § 101.12, that will provide a set of standardized serving (portion) sizes for 159 food product categories that food manufacturers are to use declaring nutrient content information for their products. These standardized serving sizes, presented in Tables 1 and 2, should not be interpreted as dietary recommendations. Rather, they represent commonly consumed amounts and therefore are reasonable quantities by which consumers can evaluate the nutritional content of a product. FDA solicits comments on whether there are other categories of food for which serving sizes should be established.

### 2. General Principles Considered in Determining Serving (Portion) Sizes

FDA used the following general principles in determining the serving sizes listed in § 101.12(b). FDA believes that these principles define the appropriate basis on which to calculate standard serving sizes for nutrition labeling purposes. These principles are set forth in § 101.12(a). The agency solicits comments on these principles.

a. As explained in section IV.A.2., above, serving size should reflect the amount of food commonly consumed per eating occasion by the target population

group. To determine this amount of food, a mean, or, where appropriate, median, consumed serving size should be derived from an appropriate food consumption data base. An appropriate data base must include a large sample and broad representation of the age groups for which the food is intended for use.

b. For nutrition labeling purposes, FDA has considered that foods intended for the general population are intended for persons 4 years of age or older (see companion document entitled "Food Labeling: Reference Daily Intakes and Daily Reference Values" published elsewhere in this issue of the Federal Register). For foods specifically labeled for infants, the target population group includes infants up to 12 months of age. For foods labeled for toddlers, the target population group is children 1 through 3 years of age.

c. Serving size should, as one comment suggested, be based on the edible portion of the food, i.e., inedible parts such as bone, seed, shell, or rind should be excluded. Inedible parts are not consumed and thus do not contribute to the nutritional value of the food.

d. Many foods are consumed both as a serving (i.e., in the form as purchased) and as a portion (i.e., as an ingredient of other foods). For example, butter and margarine are consumed as such and as ingredients of cookies and cakes. Since the amount of such foods used as an ingredient (i.e., portion size) varies tremendously from recipe to recipe, basing the information in the nutrition label on the use of the food in the form purchased (i.e., serving size) will allow for more consistency. Therefore, the serving sizes declared for these foods in nutrition labeling should be based on the use of the food in the form purchased, e.g., 1 tablespoon of butter.

e. Serving size should reflect the major dietary use of the food. For example, milk may be used as a beverage or as a liquid to add to coffee or cereal. Because the major usage of milk is as a beverage, the serving size for milk should reflect the amount consumed as a beverage. However, if the product, as packaged, is intended for other purposes, and that fact is clear from the package, the product should be labeled with the serving size that is consistent with the intended use.

f. Serving size should be uniform for foods that have similar dietary usage and that have similar product characteristics that affect consumption size. For example, all chips and other snacks that are consumed in a similar manner and that can replace one another (such as pretzels and extruded

salty snacks) should have the same serving size. If these foods all bear the same serving size, consumers will be able to make comparisons among these products for such factors as sodium content and nutritive value.

### 3. Determination of Standard Serving Size

This section describes in detail the methodology that FDA used in applying the general principles listed in the preceding section to determine the standard serving sizes for nutrition labeling.

a. *Selection of food consumption data base.* FDA needed a food consumption data base that contained individual food intake data representative of the food consumption practices of the three age groups of interest as its starting point for determining serving sizes. Several large scale, nationally representative food consumption surveys were available. USDA's 1977-1978 Nationwide Food Consumption Survey (NFCS) (Ref. 10), the Second National Health and Nutrition Examination Survey (NHANES II) conducted by DHHS from 1976 to 1980 (Ref. 11), and USDA's Continuing Survey of Food Intakes by Individuals (CSFII), conducted between 1985 and 1986 (Refs. 12 to 14), were the most recent survey data available at the time of this analysis.

FDA chose USDA's 1977-1978 NFCS as the data base for determining the standard serving sizes because it contained: (1) The largest number of persons, 30,777; (2) data on 3-day dietary intakes; and (3) data for all ages.

Results from two more recent nationwide food consumption surveys, the NFCS conducted by the USDA in 1987-1988 and the NHANES III conducted by the DHHS, would have been helpful in assuring that the results from the 1977-1978 NFCS are still appropriate. However, neither data base was available to FDA at the time of this serving size data analysis. The NHANES III is currently in the field data collection stage, and results from USDA's 1987-1988 NFCS are not yet publicly available. If data from these surveys become available within the necessary time frame, they will be used by the agency in preparing the final rule on serving sizes.

b. *Steps for determining standard serving sizes from data base.* Using the food intake data from the selected data base (i.e., USDA's 1977-1978 NFCS (Ref. 10)), FDA determined standard serving sizes for 159 food product categories. The agency made its determinations based on the steps listed below. The agency's computations for each product

category are on file at the Dockets Management Branch (Ref. 15). The agency welcomes public comment on its method for determining serving size.

i. *Step 1.* FDA first grouped all food products into 10 major food groups according to the food grouping system used by the USDA for the NFCS (Ref. 15). The 10 groups are milk and milk products; meat, poultry, fish, and mixtures containing these products; eggs, mixtures with eggs, and egg substitutes; dry legumes, nuts, and seeds; grain products; fruits; vegetables; fats, oils, and salad dressings; sugars, sweets, and beverages; and miscellaneous foods such as soy sauce, steak sauce, and vinegar.

FDA further divided the foods within each of these major food groups into smaller food groups by product class. For example, milk and milk products were divided into such groups as milks, cheeses, and ice creams. The agency then further divided foods within each of these product classes into subgroups according to dietary usage and other characteristics that were likely to affect the levels of consumption of foods within the product class. For example, FDA divided cream into two subgroups, fluid cream and powdered cream and pickles into 5 subgroups: dill pickles, sour pickles, sweet pickles, relishes, and olives.

The agency grouped the foods in this way to assure that only those foods that were likely to have similar levels of consumption were included in the final food group used for the consumed serving size data analysis. The resultant food groups represented the preliminary product categories.

ii. *Step 2.* Because the survey data in the 1977-1978 NFCS were collected for purposes other than for estimating serving sizes, food groupings used in the survey often contained foods differing in consumed serving size. Consequently, FDA had to select the foods from a specific grouping that it would use to calculate the mean serving size for the particular product category.

For example, because incomplete information was obtained from survey respondents, baby foods that were not fully described could have been either the "strained" type (intended for use by younger infants) or "junior" type (intended for use by older infants). These two types of food differ in consumed amount. As a result, the agency did not use these foods to determine serving sizes for either "strained" or "junior" type baby food. In determining the consumed serving size of the "strained" or "junior" type baby foods, the agency based its computations on only those baby foods

that were specifically identified as "strained" or "junior" type in their names.

Moreover, some survey foods did not represent the foods available in the marketplace, and thus the agency did not include these foods in estimating consumed serving sizes for nutrition labeling. For example, to estimate consumed serving size of breads, the agency included only untoasted breads, not toasted breads.

iii. *Step 3.* FDA determined the mean and the median consumed serving sizes per eating occasion for each preliminary product category.

iv. *Step 4.* FDA converted the g weight of the mean consumed serving size determined in step 3 to measures that are more meaningful for nutrition labeling purposes, i.e., to household measures such as oz, fl oz, cups, tablespoons, and teaspoons. The agency used the g to household measure units described in the USDA's "Manual of Food Codes and Conversions of Measures to Gram-Weight for Use with Individual Food Intake Data from the 1977-1978 Nationwide Food Consumption Survey" (Ref. 16) to convert g weights to household measures. It was necessary to make this conversion at this time, rather than after the aggregation of foods into final standard serving size groups, because of differing densities among similar types of foods. For example, while frozen yogurts and ice milk were ultimately grouped together into one category (see step 6 below) because they are substitutable in the diet, their conversions to household units were done separately because the average weight of 1 cup of ice milk is about 131 g, and the average weight of 1 cup of frozen yogurt is about 193 g.

In converting the g weight to the household measure, the agency used the following general criteria in determining whether weight or volumetric measures should be used: Volumetric measures were used: (1) For beverages and (2) if all foods in the food group are usually measured on a volume basis by consumers, e.g., honey, syrups, preserves, and salad dressings. Weight measures were used: (1) If foods in the food group are usually not measured on a volume basis, e.g., fish and pizzas; (2) if the food is sold in large distinct shapes or pieces such as muffins, doughnuts, candy bars, and cookies; and (3) if some foods in the group are often measured by weight, but others are measured by volume (e.g., for fruits and vegetables, small berries and green peas may be measured by volume (cup), but many whole fruits and vegetables (e.g., broccoli spears) cannot).

v. *Step 5.* FDA next rounded the mean consumed serving size in household measures to a more meaningful measure (e.g., 3.8 oz of fish to 4 oz, 0.6 cup of stuffing to 2/3 cup, and 0.9 cup of milk to 1 cup) to establish preliminary serving sizes. In rounding the values, FDA considered the median consumed serving size as well as the mean. For example, if the mean was 2.3 oz and the median was 1.6 oz, the agency rounded the mean down to 2 oz rather than up to 2.5 oz.

vi. *Step 6.* FDA collapsed the product categories further to combine product categories that had the same or similar preliminary serving sizes to reduce the number of product categories. For example, mayonnaise, sandwich spread, and mayonnaise-type dressings of the fats and oils category had similar preliminary serving sizes, and thus FDA combined them into one product category.

vii. *Step 7.* Finally, to confirm that all products currently on the market were covered and to test the feasibility of the preliminary serving sizes against current practices in the marketplace, FDA staff checked the labeling of most food products that were available in major chain grocery stores in the greater Washington, DC metropolitan area. The agency also took into account the serving sizes used by the manufacturers, as reported in FDA's Food Labeling and Packaging Survey (Ref. 17) in this step. As a result, the agency made some adjustments to the preliminary serving sizes to make them compatible with the current marketplace.

Because food consumption surveys report amounts of foods as consumed, information on the consumed serving sizes of many foods that are customarily used as ingredients (e.g., tomato paste, tomato sauce, and pie crust) was not available in the NFCS. In addition, many products introduced into the food supply since the 1977-1978 NFCS (such as frozen entrees and meals; snack mixtures; fruit snacks; new varieties of breakfast cereals; and baby fruits, vegetables, and dinners in dry mixes) were identified through the informal survey of the grocery stores. When appropriate food intake information was not available in the food consumption data base, FDA determined serving size by taking into consideration: (1) Serving sizes currently used by the manufacturers, (2) dietary usage of the product, and (3) consumed serving sizes of similar type of products if available.

#### 4. Presentation of Serving Sizes

a. *Standard Serving Sizes.* The standard serving sizes calculated by

FDA using the methods and principles discussed above are proposed in § 101.12(b). Paragraph (b) contains two tables. Table 1 lists proposed serving sizes for foods represented or intended to be for use by infants and toddlers, and Table 2 lists proposed serving sizes for foods intended for use by persons 4 years of age and older. For both tables, the agency based the calculations on the appropriate consumed serving sizes reported for the target group.

Because there are only a few products on the market specifically intended for toddlers, the agency grouped these foods with baby foods. However, in determining serving sizes for toddler foods, the agency used the average amounts of these foods consumed by children aged 1 through 3 years.

The standard serving sizes are generally presented in oz and fl oz. For a few product categories, however, the agency has determined that other household measures, such as cups, tablespoons, teaspoons, or g, are more appropriate standards. The agency made these determinations because the density of the product within the product category differs among brands, or because the amount of the product that is used is too small to be expressed in oz. For example, the serving size for salt is so small (1 g) that it could not be expressed in any meaningful household unit, and thus the agency has tentatively decided to express it in g.

Portion sizes of foods that are almost always consumed as a component of another food, such as pie crust, pie filling, or cake frosting, also present a problem. Consistent with the agency's tentative conclusion that serving sizes should reflect the amount of food commonly consumed, the agency is proposing in § 101.12(c) that the approximate amount normally used to make one serving of the final product, that is, the pie or cake, as consumed, shall constitute the serving size for these types of products.

b. *Serving sizes for fresh fruit.* Based on consumption data, the standard serving size for fresh fruits is 5 oz. The only exception to this amount is watermelon. Based on consumption data, FDA has calculated that the average amount of this fruit consumed per eating occasion is 12 oz. However, all fruits do not lend themselves equally to 5 oz serving sizes. Some fruits, like grapefruit, are larger than 5 oz. Others, like blueberries and strawberries, are smaller than 5 oz. Therefore, to accommodate these variations in fruit size, the agency is including three food product categories to cover most fresh fruit in § 101.12(b).

The agency recognizes that many fresh fruits (e.g., apples, oranges, and pears) are almost always consumed at a single eating occasion. These foods are analogous to single-serving containers. Thus, one category of fresh fruits that FDA is proposing to establish would include those fruits that, consistent with the agency's general treatment of single-serving containers, per piece weigh 50 percent or more, but less than or equal to 150 percent, of the standard serving size. Since the standard serving size for fresh fruit is 5 oz, fresh fruit with an average edible portion weight of more than 2.5 oz but less than 7.5 oz would fit within this category. The nutrition label for these fresh fruits could state that the serving size is one piece of fruit.

The second category of fresh fruits would include those that generally weigh less than 50 percent of the standard serving size. Fifty percent appears to be a reasonable cutoff level because, for fruits with an edible portion weighing less than 2.5 oz. per piece, consumers generally eat more than one piece per eating occasion. Although these smaller fruits would use the standard serving size (e.g., 5 oz. (140 g) for blueberries), to enable consumers to visualize the serving size, the agency has provided for the additional voluntary declaration of the number of fruits or cups of fruit that approximate the standard serving size (e.g., 1 cup of blueberries or 3 apricots).

The third category would include those fresh fruits that as a whole piece exceed 150 percent of the standard serving size. These fruits generally are served in fractional pieces (e.g.,  $\frac{1}{2}$  grapefruit). Thus, the serving size for this type of fruit would be a 5 oz. piece of the fruit. In addition, the nutrition label would state the approximate number of servings per fruit.

It is important to bear in mind that nutrition labeling of fresh fruits will generally be based on data bases, as discussed in the document entitled "Food Labeling: Mandatory Nutrition Labeling and Nutrient Content Revisions," published elsewhere in this issue of the *Federal Register*. The weights of average sizes of the various types of fruits will be determined as a part of the process of developing the data base.

c. *Metric Quantity.* Column 2 of both proposed Tables 1 and 2 (§ 101.12(b)) specifies the metric quantity equivalent to the standard serving size. As stated earlier, FDA is proposing to require that serving size be declared first on the label in the specified standard serving size followed by the metric quantity in parentheses, e.g., 2 oz. (56 g). Where the

metric quantity is left blank in the tables, manufacturers will be required, if this proposal is adopted, to provide the g weight of the standard serving size of their product. (See section IV.A.3., above.)

d. *Household Units.* In declaring the serving size on the label, manufacturers may also express the standard serving sizes in more easily visualized household units, e.g., pieces, cups, tablespoons, teaspoons, and jar. In the interest of uniformity, FDA is proposing the household units appropriate for each product category in column 3, entitled "voluntary household measures", of Tables 1 and 2 (§ 101.12(b)).

e. *Products requiring further preparation.* Unless otherwise stated in the product category name (e.g., coffee, instant, dry), serving size values proposed in Tables 1 and 2 represent the amount of the ready-to-serve, or almost ready-to-serve (e.g., heat and serve, and brown and serve), form of the product. For a few categories of dry products, such as dry pastas, dry legumes, and dry coffee, that come in relatively uniform forms, FDA was able to determine a reasonable standard portion size based on the consumed serving size of the prepared form of the food. To convert the amount as consumed to the amount in dry form, the agency used the percent yield reported in "Food Yields," published by USDA (Ref. 18), and other pertinent information (e.g., manufacturer's directions). However, in general, FDA has not listed dry mixes and concentrated products as separate food product categories. These products vary greatly in their ingredients and degree of concentration. Therefore, as proposed in § 101.12(c), portion sizes of dry mixes and concentrates will have to be determined by the manufacturer based on the amount required to make one standard serving of the prepared form of the product.

Other unprepared forms of products such as doughs, batters, and raw fish and shellfish are also not listed as separate categories. It is not possible or practical to determine standard serving sizes for these forms because percent yields may differ among products within the same product category, and appropriate percent yield information is not available for many foods. For example, 4 oz. of several different species of raw fish will yield different cooked weight, depending, in part, on the moisture content of the raw food. Therefore, as proposed in § 101.12(c), the serving size of such products that require further cooking will have to be determined by the manufacturer based on the amount required to make one

standard serving of the prepared form of the product.

**f. Other related matters.** As discussed in section III.A (above), several comments stated that some manufacturers appear to have manipulated serving sizes of their products so that a per serving content would allow claims such as "low calorie" or "low sodium." To address these concerns and similar concerns regarding imitation or substitute foods (as defined in § 101.3(e)), FDA is proposing in § 101.12 (d) and (e) that the serving size for an imitation or substitute food or for a modified version of the food, such as a "low calorie" version of a food, will have the same serving sizes as those of the regular counterpart foods. Thus, imitation foods or foods such as "low calorie" or "low sodium" versions of a food are not listed as separate categories in Table 2 of proposed § 101.12(b).

Certain foods for special dietary use, such as dietary supplements and infant formulas, are not included in Tables 1 and 2. For such products, serving size would be specified by the manufacturer on the label in compliance with other regulations.

#### 5. Use of Serving Size To Evaluate Adjectival Labeling Descriptors

For compliance purposes, FDA is proposing to utilize the standard serving sizes, rather than the actual container or package size, to determine whether the use of adjectival labeling descriptors, such as "low calorie" or "low sodium," is appropriate on foods in multi-serving packages and in single-serving containers and packages that contain 100 percent or less of the standard serving size. For example, where a product for which the proposed standard serving size is 12 fl. oz. e.g., carbonated beverages, is sold in an 8-fl. oz. container, a manufacturer would be able to use the term "very low sodium" on the label only if the beverage contains 35 milligrams or less sodium on a 12 fl. oz. basis. However, for single-serving containers and packages that contain more than 100 percent but no more than 150 percent of the standard serving size, the agency is proposing that the entire contents of the container be the basis for determining whether the food meets the criteria for allowable use of an adjectival descriptor.

The major advantage of this proposed requirement is that the adjectival descriptors on all foods in the marketplace will have a consistent basis. This standardization will eliminate a potential source of confusion for consumers. It will also eliminate the motivation for manufacturers to use

unreasonably small single-serving containers to qualify for adjectival labeling, particularly for those nutrients for which moderation in intake is recommended, e.g. calories, sodium, fat, and cholesterol.

The major disadvantage to this approach for determining eligibility for use of adjectival descriptors for single-serving packages is the potential for the appearance of inconsistencies between two similar or identical products, one of which falls at or below 100 percent of the standard serving size and the other of which falls between 100 and 150 percent of the standard serving size. However, in weighing the trade-off of this type of confusion against allowing products whose container size falls between 100 and 150 percent of the standard serving size to base their adjectival descriptors on a smaller serving size value than is actually likely to be consumed, the agency tentatively concluded that accuracy in terms of what consumers would be eating was more critical than reference to a standard serving size. Another disadvantage is the potential for manipulation of the net content of a package to slightly exceed 150 percent of the standard serving size and thus for the food to be considered to contain two servings instead of one. This change might make the product eligible for use of adjectival descriptors. Regardless of where the cutoff is, however, this type of manipulation can occur.

In arriving at the proposed approach, FDA considered two other solutions. The first option would be to always base adjectival descriptors on standard serving sizes, regardless of whether the single-serving container fell above or below the standard serving size. To help avoid confusion for comparisons of the nutritional contents between single-serving and multi-serving containers, however, the term "per container" rather than "per serving" would be used on the nutrition label of single-serving containers.

This approach has the advantage of simplicity. Moreover, like the proposed approach, it would eliminate the motivation for manufacturers to use very small serving sizes to become eligible for use of adjectival descriptors. However, because single-serving containers between 100 and 150 percent of the standard serving size could contain more of the nutrients or food components than is permitted by the definition for an adjectival descriptor, this approach might create confusion and misunderstanding among consumers as to the standards on which foods qualify for use of the descriptor.

A second option would be to allow (or require) dual declaration of nutrition information on single-serving containers. One column of nutrition information would be on the basis of "per container." The second column of nutrition information would be based on the standard serving size and would also be the basis for use of adjectival descriptors. A major advantage of this approach would be the standardization of eligibility for adjectival descriptors across all single-serving container sizes and also with multi-serving container sizes. Another advantage would be to enhance the ability of consumers to make direct comparisons of the nutritional content of multi-serving containers with single-serving containers. Additionally, consumers could clearly see the relationship between the basis for the adjectival descriptor and the amount of nutrient in the container. The obvious disadvantage of this option is that an extra column of information would be required, which would add information to an already crowded label.

Because of clear advantages and disadvantages to both the proposed approach as well as to the alternate approaches described here, the agency is requesting comments on how best to determine compliance for adjectival descriptors on single-serving containers.

#### 6. Petition Process

FDA is proposing in § 101.12(g) to establish, in addition to the current requirements prescribed in 21 CFR part 10, a procedure whereby interested persons may petition the agency to amend an established serving (portion) size or to establish an appropriate serving (portion) size for a product not covered in proposed § 101.12(b).

FDA is proposing to require that a petition to establish or to amend a serving size be consistent with the general determinations set forth in proposed § 101.12(a), and that it must include: (1) A description of the product; (2) a description of the form (e.g., dry mix, frozen dough) in which the product will be marketed; (3) the intended dietary use of the product (e.g., milk as a beverage and not as an addition to cereal); (4) the population group for which the product will be offered for use (e.g., infants, children under 4 years of age); (5) the names of the most closely-related products (or in the case of foods for special dietary use and imitation or substitute foods, the names of the products for which they are offered as substitutes); (6) the suggested serving size (the amount of edible portion of food as consumed, excluding bone, seed,

shell or other inedible components) for the population for which the product is intended; (7) for products that require cooking or the addition of water or other ingredients, the amount of edible portion of food required to make the suggested serving of prepared food; and (8) methodology and procedures that were used to determine the suggested serving size.

#### V. Other Affected Rules; Revision of 21 CFR 101.8

The agency is proposing to revise 21 CFR 101.8(a) to provide that where nutrition information is required, and firms elect to place statements on product labels concerning the number of servings in a package in locations in addition to the location where nutrition information is placed, such statements must be in the same terms as are used for nutrition information. This proposed revision is needed to prevent consumer confusion over serving size.

#### VI. References

The following information has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m. Monday through Friday.

1. U.S. Department of Agriculture, "Composition of Foods, Raw, Processed, Prepared, Human Nutrition Information Service," Washington, DC, Agriculture Handbook No. 8-1 to 8-21, 1976-1989.
2. U.S. Department of Agriculture, "Food," Home and Garden Bulletin No. 228, Science and Education Administration, Washington, DC, 1979.
3. U.S. Department of Agriculture, "Dietary Guidelines and Your Diet," Home and Garden Bulletin No. 232-1 through 232-7, Human Nutrition Information Service, Washington, DC, 1988.
4. Committee on Diet and Health, Food and Nutrition Board, Commission on Life Sciences, National Research Council, "Diet and Health, Implications for Reducing Chronic Disease Risk," National Academy Press, Washington, DC, 1989.
5. U.S. Department of Agriculture and U.S. Department of Health and Human Services, "Nutrition and Your Health, Dietary Guidelines for Americans," Home and Garden Bulletin No. 232, U.S. Government Printing Office, Washington, DC, 1985.
6. "The Surgeon General's Report on Nutrition and Health," DHHS (PHS) Publication No. 88-50210 (GPO Stock No. 017-001-00465-1), U.S. Government Printing Office, Washington, DC, 1988.
7. Codex Alimentarius Commission, Codex Alimentarius, vol. VI, Codex Standards and Guidelines for the Labeling of Foods and Food Additives, 2 ed., reference No. CAC/GL-1985, Food and Agriculture Organization of the United Nations/World Health Organization, 1985.
8. Commission of the European Communities, amended proposal for a

Council directive on nutrition labeling rules for foodstuffs intended for sale to the ultimate consumer, Com (89) 420 final—Syn 155, Brussels, Belgium, August 1989.

9. Heimbach, J.T., and Stokes, R.C., "Nutrition Labeling for Today's Needs," National Technical Information Service, Springfield, VA, Publication No. PB82154402, 1981.

10. U.S. Department of Agriculture, USDA nutrient data base for individual intake surveys, release no. 1, accession No. PB82-128504, Springfield, VA, National Technical Information Service, 1982.

11. U.S. Department of Health and Human Services, National Center for Health Statistics, National Health and Nutrition Examination Survey, Cycle II, 1976-80, NHANES II 24-hour recall/specific food item, magnetic tape no. PB82-142639, Springfield, VA, National Technical Information Service, 1982.

12. U.S. Department of Agriculture, CSFII: four days food intake for women and their children 1-5, 1985, accession no. PB88-201249/HAE, Springfield, VA, National Technical Information Service, 1988.

13. U.S. Department of Agriculture, CSFII: one day's intake data for men 19-50 years of age, 1985-1986, accession no. PB87-197141/HAE, Springfield, VA, National Technical Information Service, 1987.

14. U.S. Department of Agriculture, CSFII: four days food intake for women 19-50, children 1-5, 1986, accession no. PB89-154355/HAE, Springfield, VA, National Technical Information Service, 1989.

15. Park, Youngmee K., memo to file, June 15, 1990.

16. U.S. Department of Agriculture, "Manual of Food Codes and Conversions of Measures to Gram-weight for use with Individual Food Intake Data from the 1977-78," Nationwide Food Consumption Survey, working copy, November 1, 1979.

17. Center for Food Safety and Applied Nutrition, Division of Consumer Studies, food label and package survey (FLAPS), 1988.

18. Agricultural Research Service, "Food Yields Summarized by Different Stages of Preparation," Agriculture Handbook No. 102, Washington, DC, U.S. Department of Agriculture, 1975.

#### VII. Preemption

Numerous comments at the public hearings and on the ANPRM suggested that these Federal serving size regulations should explicitly preempt any State regulations on serving size. The preemption issue is complex and divisive: whether a uniform, national label is necessary for consumers and manufacturers to function in the marketplace versus whether States should be permitted to require additional information for their residents. The input of States, as well as consumers, businesses, and other concerned parties is essential in evaluating this matter. FDA therefore requests comment on the issue of whether preemption is appropriate.

#### VIII. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### IX. Economic Impact

FDA is proposing several changes to the food product label: mandatory nutrition labeling, revision of the U.S. RDA's and standardization of serving sizes. Because these proposed changes are related and, if adopted, will become effective concurrently, the agency has considered their combined economic impacts and, where possible, separated out the contribution of each. If the proposed mandatory nutrition labeling requirements are adopted, manufacturers will have to change their food product labels. It is reasonable to expect that any additional label changes made to comply with this proposed rule would be implemented concurrently with those label changes being made in accordance with the mandatory nutrition labeling requirements. Thus, no additional costs are expected to be incurred in satisfying the requirements of this rule, as proposed, beyond those costs estimated for compliance with the mandatory nutrition labeling requirements.

Therefore, in accordance with Executive Order 12291, FDA has prepared a Preliminary Regulatory Impact Analysis (PRIA) that projects the combined economic effects of these proposed rules. In addition, this analysis satisfies the requirements of the Regulatory Flexibility Act (Pub. L. 96-354). FDA certifies that this proposed rule to standardize serving sizes on the food label is not a major rule and will not have a significant impact on a substantial number of small entities, including small businesses. The PRIA is on file and may be seen at the Dockets Management Branch (address above).

#### X. Effective Date

FDA is proposing to make these regulations effective 1 year after the publication of a final rule. The agency's normal practice is to make food labeling regulations effective on the uniform compliance date that follows publication of the final rule. FDA periodically (every 2 years) establishes these uniform compliance dates to limit the economic impact of requiring individual label changes on separate dates and to give industry sufficient lead time to make label changes. (The current

uniform compliance date for all FDA final food labeling regulations that are published in the *Federal Register* after January 1, 1990, and before January 1, 1992, is January 1, 1993 (see 55 FR 276; January 4, 1990).) However, the agency considers that a deviation from this practice is appropriate here because of the importance of the changes that the agency is proposing and because of the great consumer interest in these matters.

The agency recognizes that this proposed action will shorten the amount of time that manufacturers have to exhaust label inventories. However, the reduction in time will not be great, and the agency tentatively concludes that any costs that may result will be outweighed by the benefits from the improved nutrition label.

Therefore, in accordance with Executive Order 12291 and the Regulatory Flexibility Act (Pub. L. 96-354), FDA certifies that this proposed rule is not a major rule and will not have a significant impact on a substantial number of small entities, including small businesses. A threshold assessment supporting these findings is on file and may be seen at the Dockets Management Branch (address above).

#### List of Subjects in 21 Part 101

Food labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 101 be amended as follows:

#### PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

2. Section 101.8 is amended by revising paragraph (a) to read as follows:

##### § 101.8 Labeling of food with number of servings.

(a) The label of any package of a food that bears a representation as to the number of servings contained in such package shall bear in immediate conjunction with such statement, and in the same size type as is used for such statement, a statement of the net quantity (in terms of weight, measure, or numerical count) of each such serving; however, such statement may be expressed in terms that differ from the terms used in the required statement of net quantity of contents (for example,

cupfuls, tablespoonfuls) when such differing term is common to cookery and describes a constant quantity. Such statement may not be misleading in any particular. Where nutrition labeling information is required in accordance with the provisions of § 101.9, however, the statement of the net quantity of each serving shall be consistent with the requirements for serving size expression set forth in that section (e.g., 10 1-cup (240 milliliters) servings). A statement of the number of units in a package is not in itself a statement of the number of servings.

3. Section 101.9 is amended by revising paragraph (b) to read as follows:

##### § 101.9 Nutrition labeling of food.

(b) All nutrient and food component quantities shall be declared in relation to a serving or, where the food is customarily not consumed directly, to a portion. The serving or portion size used for a food shall be the serving or portion size established for that food in § 101.12.

(1) The term "serving" or "serving size" means that amount of food commonly consumed per eating occasion by persons 4 years of age or older, or, when the article purports or is represented to be for infants or for toddlers, by infants up to 12 months of age or by children 1 through 3 years of age, respectively. The term "portion" means the amount of a food customarily used only as an ingredient in the preparation of other foods (e.g., 1 ounce flour or 3 ounces tomato sauce).

(2) Unless exempt under the provisions of paragraph (h)(11) of this section, a package or container containing 150 percent or less of the serving size determined in accordance with § 101.12 shall be considered to be a single-serving container. The entire contents of such a package or container shall be labeled as a serving.

(3) Except as provided in paragraph (b)(2) of this section, a label statement regarding a serving (portion) shall be the serving size as set forth in § 101.12(b) and shall be followed by the equivalent metric quantity in parentheses (with weight expressed in grams and volume in milliliters). In addition, serving size may be declared, in parentheses, in terms of the easily identified unit of household measure listed in § 101.12(b) as a "voluntary household measure" (e.g., "2 ounces (56 grams) (2 slices [or about 2 slices])" for bread). The voluntary statement identifying a unit of household measure shall be declared to the nearest half unit corresponding to the standard serving size (e.g., 2.5

pieces). Rounding may be indicated by use of the term "about."

(4) For labeling purposes, a teaspoon means 5 milliliters (approximately one-sixth fluid ounces); a tablespoon means 15 milliliters (approximately one-half fluid ounces); a cup means 240 milliliters (approximately 8 fluid ounces); 1 fluid ounce means 30 milliliters; and 1 ounce in weight means 28 grams.

(5) Number of servings per package or container shall be declared in the nearest 0.5 serving (e.g., 2.5 servings, not 2.3 servings; 7 servings, not 7.2 servings). Rounding may be indicated by use of the term "about" (e.g., about 7 servings).

(6) The declaration of nutrient and food component quantities shall be on the basis of the food as packaged or purchased. Another column of figures may be used to declare the nutrient and food component information on the basis of 100 grams (or 100 milliliters) of the food as packaged or purchased, in the same format as required by paragraph (c) of this section.

4. Section 101.12 is added to read as follows:

##### § 101.12 Serving (portion) size.

(a) The general principles that FDA followed in arriving at the serving or portion size set forth in paragraph (b) of this section are that:

(1) The serving (portion) sizes for persons 4 years of age or older should reflect the approximate average amount of food that persons in this population group consume per eating occasion and should be based on data set forth in an appropriate national food consumption survey.

(2) A serving (portion) size for an infant or child under 4 years of age should be calculated to reflect the approximate average amount of food consumed per eating occasion by infants up to 12 months of age or by children 1 through 3 years of age, respectively, and should be based on data set forth in an appropriate national food consumption survey. Such serving (portion) sizes should only be used when the article of food purports or is represented to be for consumption by an infant or by a child under 4 years of age.

(3) Serving size should be based on only the edible portion of food, and not bone, seed, shell or other inedible components;

(4) Nutrition information on products that are consumed as an ingredient of other foods but that may also be consumed in the form in which they are purchased (e.g., butter) should be declared on the basis of a serving size

that is based on their use in the form purchased;

(5) Serving size should be based on the major intended use of the food (e.g.,

milk as a beverage and not as an addition to cereal); and

(6) Foods that have similar dietary usage and product characteristics that affect consumption should be grouped

together (e.g., all chips and similar snacks).

(b) The following standard serving (portion) sizes shall be used for food labeling:

TABLE 1.—STANDARD SERVING SIZES: <sup>1</sup> INFANT AND TODDLER FOODS

Product category	Standard serving size <sup>2</sup>	Label statement	Voluntary household measures
	(1)	(2)	(3)
Cereal, dry instant.....	½ ounce (oz.)	½ oz. (14 gram (g)).	____ Tablespoon (tbsp(s)) or ____ cup(s).
Cereal, prepared.....	4 oz.	4 oz. (112 g)	____ Jar.
Cookies, teething biscuits and toasts.....	¼ oz.	¼ oz. (7 g)	____ piece(s).
Cottage cheese.....	3 oz.	3 oz. (84 g)	____ Jar.
Dinner, dessert, fruit, vegetable or soup, dry mix.....	½ oz.	½ oz. (14 g)	____ tbsp(s) or ____ cup(s)
Dinner, dessert, fruit, vegetable or soup, junior type.....	4 oz.	4 oz. (112 g)	____ Jar.
Dinner, dessert, fruit, vegetable or soup, strained type.....	3 oz.	3 oz. (84 g)	____ Jar.
Dinner, fruit, vegetable, stew or soup for toddlers.....	6 oz.	6 oz. (168 g)	____ Jar.
Egg/egg yolk.....	2 oz.	2 oz. (56 g)	____ Jar.
Juice, all varieties.....	4 fluid (fl) oz.	4 fl oz. (120 milliliters (mL)).	____ Cup(s).

<sup>1</sup> Unless otherwise noted in the product category name, serving sizes are for the ready-to-serve (RTS) or almost ready-to-serve form of the product (e.g., heat and serve and brown and serve). If not listed separately, serving size for the unprepared form (e.g., dry cereal) is the amount required to make one serving of the prepared form.

<sup>2</sup> Standard serving size established by the Food and Drug Administration (FDA). These values have been derived primarily from the amount of food commonly consumed per eating occasion as reported in the 1977-1978 Nationwide Food Consumption Survey conducted by the U.S. Department of Agriculture.

TABLE 2.—STANDARD SERVING SIZES <sup>1</sup>: GENERAL FOOD SUPPLY

Product category	Standard serving size <sup>2</sup>	Label statement <sup>3</sup>	Voluntary household measures <sup>4</sup>
	(1)	(2)	(3)
<b>Bakery Products:</b>			
Bread sticks.....	1 oz.	1 oz. (28 g)	____ Piece(s).
Breads (excluding sweet quick type), biscuits, rolls, croissants, muffins, bagels, tortillas.....	2 oz.	2 oz. (56 g)	____ Piece(s) for sliced bread and distinct pieces (e.g., biscuits, rolls).
Breakfast bars and toaster pastries.....	2 oz.	2 oz. (56 g)	____ Piece(s).
Brownies.....	2 oz.	2 oz. (56 g)	____ Piece(s).
Cake with icing, all varieties except cheese cake.....	3½ oz.	3½ oz. (98 g)	____ Piece(s) for distinct pieces (e.g., cupcakes).
Cake without icing, all varieties except cheese cake.....	2 oz.	2 oz. (56 g)	____ Piece(s) for distinct pieces (e.g., cupcakes).
Cheese cake.....	4 oz.	4 oz. (112 g)	____ Piece(s) for distinct pieces (e.g., individually packaged product).
Coffee cakes, doughnuts, Danish, sweet rolls, sweet quick type breads.....	2½ oz.	2½ oz. (70 g)	____ Piece(s) for sliced bread and distinct pieces (e.g., doughnut, danish).
Cookies, graham crackers, or sandwich type crackers.....	1 oz.	1 oz. (28 g)	____ Piece(s).
Crackers, all varieties excluding graham and sandwich type.....	½ oz.	½ oz. (14 g)	____ Piece(s).
Croutons.....	¼ oz.	¼ oz. (9 g)	____ Tbsp(s) or cup(s).
French toast, pancakes.....	4 oz.	4 oz. (112 g)	____ Piece(s) for distinct pieces.
Pies, cobblers, eclairs, turnovers, other pastries.....	4 oz.	4 oz. (112 g)	____ Piece(s).
Pie crust.....	½ of 8 inch (in) crust.	½ of 8 in crust (____ g).	
	½ of 9 in crust.	½ of 9 in crust (____ g).	
Taco shell.....	1 oz.	1 oz. (28 g)	____ Shell.
Waffles.....	3 oz.	3 oz. (84 g)	____ Piece(s).
<b>Beverages:</b>			
Carbonated and noncarbonated drinks including fruit drinks, wine cooler and mineral water.....	12 fl oz.	12 fl oz. (360 mL).	____ Cup(s).
Coffee or tea, prepared.....	8 fl oz.	8 fl oz. (240 mL).	____ Cup(s).
Coffee, ground, dry.....	2 tbsp.	2 tbsp. (____ g)	
Coffee, instant, dry; or tea, instant or leaf, dry.....	2 tsp.	2 tsp. (____ g)	____ Cup(s).
Ice tea, prepared.....	12 fl oz.	12 fl oz. (360 mL).	____ Cup(s).
<b>Cereals and other grain products:</b>			
Breakfast cereals (hot cereal type), hominy grits, dry.....	1½ oz.	1½ oz. (42 g)	____ Tbsp(s) or ____ Cup(s)
Breakfast cereals, ready to eat (weigh < 1 oz per cup).....	1 oz.	1 oz. (28 g)	____ Cup(s) or ____ Piece(s) for large distinct pieces (e.g., biscuit type).
Breakfast cereals, ready to eat (weigh > 1 oz but < 2 oz. per cup).....	1½ oz.	1½ oz. (42 g)	____ Cup(s) or ____ Piece(s) for large distinct pieces (e.g., biscuit type).
Breakfast cereals, ready to eat (weigh > 2 oz. < 3 oz. per cup).....	2 oz.	2 oz. (56 g)	____ Cup(s) or ____ Piece(s) for large distinct pieces (e.g., biscuit type).

TABLE 2.—STANDARD SERVING SIZES.<sup>1</sup> GENERAL FOOD SUPPLY—Continued

Product category	Standard serving size <sup>2</sup>	Label statement <sup>3</sup>	Voluntary household measures <sup>4</sup>
	(1)	(2)	(3)
Breakfast cereals, ready to eat (weigh >3 oz. per cup)	3 oz.	3 oz. (84 g)	Cup(s) or Piece(s) for large distinct pieces (e.g., biscuit type).
Cornstarch	1 tbsp.	1 tbsp. (—g)	
Flours or meal	1 oz.	1 oz. (28 g)	Tbsp(s) or cup(s).
Bran or wheat germ	1/2 oz.	1/2 oz. (14 g)	Tbsp(s).
Grains, e.g., rice, barley, dry	2 oz.	2 oz. (56 g)	Cup(s).
Grains, e.g., rice, barley, prepared	1 cup	1 cup (—g)	
Hush puppies	3 oz.	3 oz. (84 g)	Piece(s).
Pastas, dry	2 oz.	2 oz. (56 g)	Cup(s).
Pastas, prepared	5 oz.	5 oz. (140 g)	Cup(s).
Pastas, dry, ready to eat, e.g., fried, canned chow mein noodles	1 oz.	1 oz. (28 g)	Cup(s).
Stuffings	1/2 cup	1/2 cup (—g)	
Dairy products and substitutes:			
Cheese, cottage or ricotta	4 oz.	4 oz. (112 g)	Cup(s).
Cheese, grated hard, e.g., parmesan	1/3 oz.	1/3 oz. (9 g)	Tbsp(s).
Cheese, all others except those listed as separate categories—includes cream cheese and cheese spread.	1 oz.	1 oz. (28 g)	Piece(s) for distinct pieces (e.g., slices, cubes) or Tbsp(s).
Cheese sauce	1/2 cup	1/2 cup (—g)	
Cocoa	8 fl oz.	8 fl oz. (240 mL)	Cup(s).
Cream or cream substitute, fluid	2 tbsp.	2 tbsp. (30 mL)	
Cream or cream substitute, powder	2 tsp.	2 tsp. (—g)	
Cream, half and half	2 tbsp.	2 tbsp. (30 mL)	
Milk, condensed, undiluted	3 tbsp.	3 tbsp. (45 mL)	
Milk, evaporated, undiluted	1 tbsp.	1 tbsp. (15 mL)	
Milk, egg nog, milk-based drinks, e.g., instant breakfast, meal replacement.	8 fl oz.	8 fl oz. (240 mL)	Cup(s).
Milk shake	12 fl oz.	12 fl oz. (360 mL)	Cup(s).
Sour cream or dairy-based dips	2 tbsp.	2 tbsp. (—g)	
Yogurt	8 oz.	8 oz. (224 g)	Cup(s).
Desserts:			
Ice cream, ice milk, frozen yogurt, sherbert	6 fl oz.	6 fl oz. (—g)	Piece(s) for individually wrapped or packaged products and Cup(s) for others.
Sundae	1 cup	1 cup (—g)	Piece(s) for individually wrapped or packaged products.
Custard, gelatin or pudding	1/2 cup	1/2 cup (—g)	
Dessert toppings and fillings:			
Cake frosting or icing	3 tbsp.	3 tbsp. (—g)	
Dessert toppings, fruits and syrups	2 tbsp.	2 tbsp. (—g)	
Dessert toppings, nuts and sprinkles	1 tbsp.	1 tbsp. (—g)	
Pie filling	3 oz.	3 oz. (84 g)	Cup(s).
Whipped toppings, dairy and nondairy products	2 tbsp.	2 tbsp. (—g)	
Egg and egg substitutes:			
Egg mixture, e.g., Egg Foo Young	3 1/2 oz.	3 1/2 oz. (98 g)	Piece(s).
Egg (all sizes)	2 oz.	1 egg (—g) <sup>5</sup>	Large, medium, etc.
Egg substitutes	2 oz.	2 oz. (56 g)	Egg equivalents.
Omelet or scrambled egg	4 oz.	4 oz. (112 g)	Cup(s).
Fats and oils:			
Butter, margarine, oil, lard, shortening	1 tbsp.	1 tbsp. (—g)	
Mayonnaise, sandwich spread, mayonnaise type dressing	1 tbsp.	1 tbsp. (—g)	
Dressings for salad	2 tbsp.	2 tbsp. (—g)	
Fish, shellfish, and meat, or poultry substitutes:			
Anchovies and caviar	1 oz.	1 oz. (28 g)	Piece(s) or Tbsp(s).
Dried, e.g., jerky	1/2 oz.	1/2 oz. (14 g)	Piece(s).
Entrees (cooked) with sauce	5 oz.	5 oz. (140 g)	Piece(s).
Entrees (cooked) without sauce	4 oz.	4 oz. (112 g)	Piece(s).
Fish and shellfish, canned	3 oz.	3 oz. (84 g)	
Substitute for bacon	1 oz.	1 oz. (28 g)	Piece(s).
Substitutes for luncheon meat, sandwich spread, Canadian bacon, sausage and frankfurter.	2 oz.	2 oz. (56 g)	Piece(s) for distinct pieces (e.g., slices, links).
Smoked or pickled fish or shellfish	3 oz.	3 oz. (84 g)	Piece(s) for distinct pieces (e.g., slices, links).
Used as toppings, e.g., substitutes for bacon bits	1/4 oz.	1/4 oz. (7 g)	Tbsp(s).
Fruits and fruit juice:			
Candied or pickled	1 oz.	1 oz. (28 g)	Piece(s).
Dehydrated/freeze-dried	1/2 oz.	1/2 oz. (14 g)	Piece(s).
Dried	1 1/2 oz.	1 1/2 oz. (42 g)	Piece(s) for large pieces (e.g., dates, figs, prunes); Cup(s) for small pieces (e.g., raisins).
Fruit sauce or relish, e.g., cranberry sauce or relish	3 oz.	3 oz. (84 g)	Cup(s).
Fruit for garnish or flavor, e.g., maraschino cherries, lemon, lime	1/4 oz.	1/4 oz. (7 g)	Piece(s) for distinct pieces (e.g., cherries).
Fruits used primarily as ingredients, e.g., cranberries	2 oz.	2 oz. (56 g)	Cup(s).
All other fruits, fresh, weighing < 50 percent but > 150 percent of the standard serving size per piece.	5 oz.	1 fruit (—g) <sup>5</sup>	

TABLE 2.—STANDARD SERVING SIZES.<sup>1</sup> GENERAL FOOD SUPPLY—Continued

Product category	Standard serving size <sup>2</sup>	Label statement <sup>3</sup>	Voluntary household measures <sup>4</sup>
	(1)	(2)	(3)
All other fruits, fresh, weighing < 50 percent of the standard serving size per piece.	5 oz.	5 oz. (—g)	Piece(s) for large pieces (e.g., strawberries, prunes, apricots, etc.); —Cup(s) for small pieces (e.g., blueberries, raspberries, etc.).
All other fruits, fresh, weighing > 150 percent of the standard serving size per piece.	5 oz.	5 oz. (—g)	Piece (e.g., 1/2 grapefruit, 1/4 cantaloupe, etc.).
All other fruits, canned or frozen	5 oz.	5 oz. (—g)	Cup(s) for small pieces (e.g., fruit cocktail).
Juice or nectar	6 fl oz.	6 fl oz. (180 mL)	Cup(s).
Juice used as ingredients, e.g., lemon juice	1 tbsp.	1 tbsp. (15 mL)	
Watermelon	12 oz.	12 oz. (336 g)	Piece(s).
Legumes:			
Bean cake (tofu)	4 oz.	4 oz. (112 g)	Piece(s).
Dry	2 1/2 oz.	2 1/2 oz. (70 g)	Cup(s).
Prepared, plain or in sauce	6 oz.	6 oz. (168 g)	Cup(s).
Meal type trays: <sup>5</sup>			
Breakfast trays, all varieties	4 oz.		
Lunch or dinner trays	5 oz.		
Cracker and cheese trays:			
Extra helping type	15 oz.		
Trays for children	8 oz.		
Trays containing 2 items	8 oz.		
Trays containing 3 or 4 items	11 oz.		
Salad plate served as a meal	8 oz.		
Sandwich	5 oz.		
Sandwich and soup	11 oz.		
Miscellaneous products:			
Batter mixes, bread crumbs, meat/poultry/fish coating mixes, dry	1 oz.	1 oz. (28 g)	Tbsp(s).
Salt, seasoning salt (e.g., garlic salt)	1 g.	1 g.	Tsp(s).
Mixed dishes:			
Appetizers, not measurable with cup, e.g., egg roll, pizza roll	3 oz.	3 oz. (84 g)	Piece(s).
Appetizers and cocktails in sauce, measurable with cup, e.g., shrimp cocktail	1/2 cup	1/2 cup (—g)	
Entree type, measurable with cup, e.g., stew, spaghetti, macaroni and cheese, pot pie, etc.	1 cup	1 cup (—g)	
Entree type, not measurable with cup, e.g., pizza, quiche, etc.	6 oz.	6 oz. (168 g)	Piece(s).
Oriental noodle with soup base, dry	3 oz.	3 oz. (84 g)	
Nuts and seeds:			
Nut, seed and mixtures	1 1/2 oz.	1 1/2 oz. (42 g)	Cup(s).
Nut and seed butter or paste	2 tbsp.	2 tbsp. (32 g)	
Used primarily as ingredient, e.g., coconut, nut and seed flour, etc.	1 oz.	1 oz. (28 g)	Tbsp(s) or —cup(s).
Potatoes and sweet potatoes:			
French fries, hash browns, skins, stuffed or pancake	3 oz.	3 oz. (84 g)	Piece(s) for large distinct pieces (e.g., patties, skins).
Mashed, candied or with sauce	6 oz.	6 oz. (168 g)	Cup(s).
Plain, fresh, frozen, canned, or cooked	4 oz.	4 oz. (112 g)	Piece(s).
Salads: (For salads served as a meal, see meal type trays.)			
Egg, Fish or shellfish salad	3 1/2 oz.	3 1/2 oz. (98 g)	Cup(s).
Fruit or pasta salad	5 oz.	5 oz. (142 g)	Cup(s).
Potato salad	6 oz.	6 oz. (168 g)	Cup(s).
Vegetable salad	3 1/2 oz.	3 1/2 oz. (98 g)	Cup(s).
Sauces, gravies, and condiments:			
Barbecue sauce, Hollandaise sauce, tartar sauce, marinade	2 tbsp.	2 tbsp. (—g)	
Main entree type sauce, e.g., spaghetti, creole, newburg, a la king, sweet and sour, etc.	1/2 cup	1/2 cup (—g)	
Used as condiments, e.g., catsup, mustard, steak sauce, salsa, worcestershire sauce, soy sauce, horseradish, etc.	1 tbsp.	1 tbsp. (—g)	
Used as topping, e.g., gravy, white sauce, cocktail sauce, etc.	1/4 cup	1/4 cup (—g)	
Snacks:			
Chips, pretzels, extruded snacks	1 oz.	1 oz. (28 g)	Cup(s) or piece(s).
Fruit-based snacks, e.g., fruit roll-ups, fruit wrinkles	1 oz.	1 oz. (28 g)	Piece(s) for distinct pieces (e.g., roll).
Grain-based snack mix without nuts or fruits	1 oz.	1 oz. (28 g)	Cup(s).
Grain-based snack mix with nuts and/or fruits	1 1/2 oz.	1 1/2 oz. (42 g)	Cup(s).
Popcorn, popped or unpopped	1 oz.	1 oz. (28 g)	Cup(s) for popped; —tbsp(s) for unpopped.
Soups:			
All varieties	1 cup	1 cup (—g)	
Sugars and Sweetens:			
Baking candies, chips, etc.	1/2 oz.	1/2 oz. (14 g)	Tbsp(s) or —cup(s).
Candies	1 1/2 oz.	1 1/2 oz. (42 g)	Piece(s).
Confectioner's sugar	1/2 oz.	1/2 oz. (14 g)	Tbsp(s).
Honey, jam, jellies	1 tbsp.	1 tbsp. (—g)	
Marshmallows	1 oz.	1 oz. (28 g)	Cup(s).
Popsicles, snow cones	2 1/2 oz.	2 1/2 oz. (70 g)	Piece(s).
Sugar	2 tsp.	2 tsp. (8 g)	
Molasses	2 tbsp.	2 tbsp. (—g)	
Syrups	1/4 cup	1/4 cup (—g)	
Vegetables:			
Corn fritters	3 oz.	3 oz. (84 g)	Piece(s).
Dehydrated or freeze-dried	1/2 oz.	1/2 oz. (14 g)	Piece(s) or —cup(s) or —tbsp(s).
Dried	1 oz.	1 oz. (28 g)	Piece(s) or —cup(s) or —tbsp(s).

TABLE 2.—STANDARD SERVING SIZES.<sup>1</sup> GENERAL FOOD SUPPLY—Continued

Product category	Standard serving size <sup>2</sup>	Label statement <sup>3</sup>	Voluntary household measures <sup>4</sup>
	(1)	(2)	(3)
Lettuce and others used primarily as ingredients, e.g., onions, mushrooms, tomatoes <sup>5</sup> .	2 oz. ....	2 oz. (56 g).....	— Piece(s) or — cup(s).
Primarily used as garnish or for flavor, e.g., chili pepper.....	1 oz. ....	1 oz. (28 g).....	— Piece(s).
All other vegetables without sauce or canned in vacuum pack.....	3½ oz. ....	3½ oz. (98 g).....	— Piece(s) for large pieces (e.g., ear of corn, brussels sprouts); — Cup(s) for small pieces (e.g., cut corn, green peas).
All other vegetables with sauce or canned in liquid.....	4½ oz. ....	4½ oz. (126 g).....	— Piece(s) for large pieces (e.g., ear of corn, brussels sprouts); — Cup(s) for small pieces (e.g., cut corn, green peas).
Juice.....	6 fl oz. ....	6 fl oz. (180 mL).....	— Cup(s).
Olives.....	½ oz. ....	½ oz. (14 g).....	— Piece(s).
Pickles, dill or sour.....	2 oz. ....	2 oz. (56 g).....	— Piece(s).
Pickles, other than dill, sour, or relish.....	1 oz. ....	1 oz. (28 g).....	— Piece(s) for distinct pieces (e.g., gherkins).
Pickles, relish.....	½ oz. ....	½ oz. (14 g).....	— Tbsp(s).
Vegetable pastes, e.g., tomato paste.....	1½ oz. ....	1½ oz. (42 g).....	— Tbsp(s).
Vegetable sauce or puree, e.g., tomato sauce, tomato puree.....	3 oz. ....	3 oz. (84 g).....	— Cup(s).

<sup>1</sup> Unless otherwise noted in the product category name, serving sizes are for the ready-to-serve or almost ready-to-serve form of the product (e.g., heat and serve and brown and serve). If not listed separately, serving size for the unprepared form (e.g., dry mixes, concentrates, dough, batter, raw fish and shellfish) is the amount required to make one serving of the prepared form.

<sup>2</sup> Standard serving size established by FDA. These values have been derived primarily from the amount of food commonly consumed per eating occasion as reported in the 1977-1978 Nationwide Food Consumption Survey conducted by the U.S. Department of Agriculture.

<sup>3</sup> In expressing the serving size on the product label, manufacturers shall first declare the standard serving size followed by the equivalent metric quantity in parentheses. Where metric quantity is left blank, manufacturers shall fill in the blank with the metric quantity specific for their product equivalent to the standard serving size specified by FDA. For unprepared products (e.g., dry mixes, concentrates, dough, raw fish), manufacturers shall provide the quantity of the unprepared product required to make one standard serving of the prepared product in oz. (or fl oz.) followed by the corresponding metric quantity in parentheses, e.g., 1½ oz. dry mix (42 g).

<sup>4</sup> This column lists other household measures that may be provided by the manufacturers to express the serving size in easily visualized units for the specific product. For example, for sliced bread manufacturers may provide the number of slices that is the nearest equivalent (in half slices) to 2 oz. The unit "piece" should be expressed in unit of the piece descriptive of the product, e.g., slice, roll, cookie, muffin, bar, stick or a fraction such as ¼ pizza.

<sup>5</sup> These products are considered to be single-serving products and thus nutrition information shall be provided per piece followed by the metric quantity of the edible portion in parenthesis, e.g., one large egg (50 g), one apple (140 g).

<sup>6</sup> These products come in single-serving containers (see the definition of single-serving containers in § 101.9(b)(2)) and thus nutrition information shall be provided per container followed by the metric quantity of the net content of the container in parenthesis, e.g., one dinner (310 g), one sandwich (130 g), or one tray (150 g).

<sup>7</sup> When these vegetables have been processed or prepared or otherwise offered for use as vegetable dishes, e.g., onion rings, sautéed mushrooms, or stewed tomatoes, serving size shall be the same as that of the vegetable dish, i.e., 3½ oz. for a vegetable dish without sauce and 4½ oz. for a vegetable dish with sauce.

(c) The serving (portion) size of a product that requires cooking or the addition of water or other ingredients, or that almost always is consumed as a component of another food, shall be the amount required to prepare one serving of the final product as established in paragraph (b) of this section.

(d) The serving size of an imitation or substitute food shall be the same as that of the food for which it is offered as a substitute.

(e) The serving size of a modified version of a food, such as "low calorie" version, shall be the same as for the food for which it is offered as a substitute.

(f) For any container with more than one serving, the serving sizes in paragraph (b) of this section will be used for the evaluation of adjectival labeling descriptors, such as "low calorie" or "low sodium". For single-serving containers containing 100 percent or less of the serving size established in paragraph (b) of this section, the serving size established in paragraph (b) of this section will be used for the evaluation of adjectival labeling descriptors. For single-serving

containers containing more than 100 percent, but 150 or less percent, of the serving size established in paragraph (b) of this section, the serving declared on the container (i.e., the entire contents) will be used for the evaluation of whether the food meets the criteria for adjectival labeling descriptors.

(g) The Commissioner of Food and Drugs, either on his or her own initiative or on behalf of any interested person who has submitted a petition pursuant to part 10 of this chapter, may issue a proposal to establish or amend a serving size (or portion) in § 101.12(b). A petition to establish or amend a serving size shall be consistent with the general determinations set forth in paragraph (a) of this section and shall include:

- (1) A description of the product;
- (2) A description of the form (e.g., dry mix, frozen dough) in which the product will be marketed;
- (3) The intended dietary use of the product (e.g., milk as a beverage and not as an addition to cereal);
- (4) The population group for which the product will be offered for use (e.g., infants, children under 4 years of age);

(5) The names of the most closely-related products (or in the case of foods for special dietary use and imitation or substitute foods, the names of the products for which they are offered as substitutes);

(6) The suggested serving size (the amount of edible portion of food as consumed, excluding bone, seed, shell or other inedible components) for the population for which the product is intended;

(7) For products which require cooking or the addition of water or other ingredients, the amount of edible portion of food required to make the suggested serving of prepared food; and

(8) The methodology and procedures that were used to determine the suggested serving size.

Dated: June 5, 1990.

James Benson,  
Acting Commissioner of Food and Drugs.  
Louis W. Sullivan,  
Secretary of Health and Human Services.  
[FR Doc. 90-16729 Filed 7-13-90; 3:14 PM].

BILLING CODE 4160-01-M



# Final Rule

Thursday  
July 19, 1990

## Part IV

## Department of the Interior

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Parts 736 and 750

#### Surface Coal Mining and Reclamation Operations; Application Fee for Permit To Conduct Surface Coal Mining Operations; Final Rule

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Parts 736 and 750

RIN 1029-AB15

## Surface Coal Mining and Reclamation Operations; Application Fee for Permit To Conduct Surface Coal Mining Operations

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is amending its regulations to add a system of fees to be paid to OSM by applicants to obtain processing and issuance of new surface coal mining permits in Federal program States and on Indian lands.

The regulations are being amended to implement the requirement at section 507(a) of the Surface Mining Control and Reclamation Act of 1977 and 30 CFR 777.17 that permit fees shall accompany an application for a permit.

**EFFECTIVE DATE:** August 20, 1990.

**FOR FURTHER INFORMATION CONTACT:** Adele Merchant, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240; Telephone (202) 208-2533 or FTS 268-2533.

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Discussion of Rule and Response to Comments
- III. Procedural Matters

**I. Background**

Section 507(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. 1257(a), provides that an application for a surface coal mining permit shall be accompanied by a fee determined by the regulatory authority, which may be less than but shall not exceed the actual or anticipated cost of reviewing, administering and enforcing the permit, and that the regulatory authority may develop procedures so that the fee may be paid over the term of the permit.

The legislative history of section 507(a) indicates that the Congress had originally intended to finance the entire cost of implementing the Act through permit fees, but that considerations of fairness and financial burdens on small and medium size operators led to the requirement for a fee that is less than

these costs. H.R. Rep. 94-1445, 94th Cong., 2nd Sess., 5-7 (1976).

OSM rules at 30 CFR 777.17 incorporate the permit application fee requirements of SMCRA section 507(a); the language of § 777.17 is similar to that of SMCRA.

On February 22, 1985, OSM proposed a rule which would have required collection of application fees to cover the full cost to the Department of the Interior for processing permits to conduct surface coal mining operations and coal exploration, for all other OSM permit processing actions and for decisions on mining plans (50 FR 7522). The rule would have applied to applications for mining on Indian lands, in the Federal program States and on Federal lands in States not having State-Federal cooperative agreements.

In response to public comments received on this initial proposal, on May 17, 1988, OSM proposed a modified system of permit fees for permitting actions in Federal program States, on Federal lands where OSM issues a permit, and on Indian lands (53 FR 17568).

The May 1988 proposal included a combination of a fixed fee plus a fee for each acre of land included in the permit area for new permit applications to conduct surface coal mining operations, and an hourly rate for permit renewals and revisions, coal exploration permits, and the transfer, assignment or sale of rights under an existing permit.

The fees for a new permit application were based on an analysis of data collected through OSM's cost accounting system for permit processing costs in Tennessee. Data accumulated for permits issued by OSM from October 1, 1985 through June 1, 1987, were analyzed to determine the costs of processing a permit and the variation in costs that resulted from variations in the acreage included in the permit, the number of administrative completeness reviews, and the number of technical deficiency letters for each permit. The permit fee amounts in the May 1988 proposed rulemaking were based on results of that analysis. For a more detailed explanation of the fee amount analysis and the choices made by OSM earlier, the reader is referred to the discussion in the May 17, 1988, proposed rule at 53 FR 17568-17575.

The comment period on the May 1988 proposal ended July 18, 1988. It was reopened on July 20, 1988 (53 FR 27361), for an additional 60 days ending September 19, 1988, in response to several requests from interested parties. On July 11, 1988, a hearing was held in Washington, DC, with three people testifying. A second hearing was held on

July 13, 1988, in Denver, Colorado, in response to requests from industry representatives. Three people testified at the July 13th hearing.

A Congressional oversight hearing was held on July 12, 1988, by the Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, U.S. House of Representatives. At this hearing, OSM Director Robert Gentile announced the planned 60-day reopening of the comment period and offered to meet with industry representatives to discuss their concerns. Subsequently, the Director met with industry representatives on August 3, 1988, in Knoxville, Tennessee, and on August 19, 1988, in Denver, Colorado. In addition to the transcripts from these hearings and the records from these meetings, OSM received 19 letters containing written comments on the proposed rule.

On February 6, 1990, OSM again reopened the comment period on the proposed rule, this time for the narrow purpose of soliciting comments on a reduced fee for small operators. The comment period closed March 8, 1990. Seven parties submitted comments on the proposed small operator fee.

**II. Discussion of Rule and Response to Comments****A. Comparison of Proposed and Final Rules**

Much of the proposed rule has either been revised or has not been adopted. The reasons for revising or not adopting parts of the proposed rule are explained in the "Response to Comments" section below.

Under this final rule OSM will collect application fees for new permits only, and these fees will apply only in Federal program States and on Indian lands. New permits applications currently under review by OSM will be assessed fees for stages of review begun on or after the effective date of the rule, as discussed further on in this section.

The proposed amendment at 30 CFR 740.25 to adopt a new permit application fee system for Federal lands is not adopted. In contrast to the proposed rule, OSM will not collect the permit fees established by this rule for Federal lands in States with approved State programs. Existing 30 CFR 740.13(b)(1) provides that applications for permits, permit revisions, or permit renewals to conduct surface coal mining operations on lands subject to part 740 shall be accompanied by a fee made payable to the regulatory authority, and that the amount of the fee shall be determined in accordance with the permit fee criteria

of the applicable regulatory program. OSM has determined that this existing provision is more in keeping with the intent of SMCRA section 523(a) than on Federal lands in a State with an approved State program, the Federal lands program shall at a minimum include the requirements of the approved State program.

In a State with an approved regulatory program and a cooperative agreement giving the State permitting authority over Federal lands, any State permit fees will be collected by the State. If there is no cooperative agreement, OSM, as the regulatory authority under § 740.13(b)(1), will collect from the applicant the fee set by the State regulatory program. If the cooperative agreement provides for dual permitting on Federal lands by OSM and the State regulatory authority, OSM and the State are both considered to be the regulatory authority for permitting purposes under § 740.13(b)(1) and each will collect the fee established by the State program.

The proposed rule included hourly fees for processing permit renewals and revisions, the transfer, assignment or sale of rights under an existing permit, and coal exploration permits. The final rule does not include these fees. OSM will conduct a study of possible fees for these actions (and for technical deficiencies in a permit application) during the year following the publication of this rule, and plans to repropose fees for these actions shortly thereafter where that study indicates fees for these actions are justified and collection is feasible. There are no hourly fees in this final rule, and no fees for permit renewals or revisions, the transfer, assignment or sale of rights, or coal exploration permits.

For a new permit application, the proposed rule provided for a \$250 administrative completeness review fee, a \$1,350 technical review fee, and a \$2,000 decision document fee, plus acreage fees of \$13.50 per acre of the permit area. This totalled \$3,600 plus the acreage fee. Incomplete applications would have been subject to additional administrative completeness review fees, and to a \$890 fee for each technical deficiency letter sent to the applicant.

In the final rule, the fees for the initial administrative completeness review, technical review and decision document are retained as proposed. The proposed fees for additional administrative completeness reviews and technical deficiency letters have not been adopted. The acreage fee is revised to a sliding scale of \$13.50 per acre for the first 1,000 acres, \$6.00 per acre for the next 1,000, \$4.00 per acre for the next

1,000, and \$3.00 per acre for the remainder. Acreage fees will be collected only for proposed disturbed areas within the permit area, that is, areas that would be disturbed by activities proposed in the permit application. Thus, under this rule, the fee for a new permit is \$3,600 plus acreage fees. The reduced fee for small operators proposed in the February 8, 1990, Federal Register is not adopted. During the coming year OSM will conduct a study that will include consideration of a fee for technical deficiencies in the permit and plans to conduct further rulemaking shortly thereafter where the study results indicate fees for these actions are justified and collection is feasible.

The proposed rule provided that no fees would be refunded if a permit were withdrawn or denied. The final rule provides for a full refund of fees if a permit is denied for certain specified reasons, and for specified refunds of fees that have been paid for a particular stage of review if an operator withdraws an application.

The proposed rule provided that the fee for each stage of permit application review must be paid before OSM would commence that stage. The final rule allows the applicant to pay all application fees when submitting the application (the \$3,600 plus acreage fees), so that there will be no delays caused by OSM notifying the applicant that the fee for the next stage of review is due, and waiting for receipt of payment. Or, the applicant may pay the fee in prescribed partial payments before each stage of review as in the proposed rule.

The proposed rule provided that if a technical deficiency letter were sent, technical review would cease until the applicant responded to the issues in the letter and submitted the technical deficiency fee. The final rule does not include technical deficiency fees and allows the technical review of other parts of the application to continue, if possible, while OSM is waiting for the information requested in a technical deficiency letter.

Fees under this rule will not be charged retroactively. However, all new permit application processing actions begun on or after the effective date of the final rule will be subject to fees. Any new permit application which is currently in process will be assessed a fee for any stage of review begun on or after the effective date of the rule. For example, if a permit application is in the administrative completeness review stage when the rule becomes effective, a technical review fee plus per-acre fees will be collected before the technical

review stage of processing will begin. If an application has entered the technical review stage of processing before the effective date of the rule, only the decision document fee will apply.

#### Federal Enforcement of a State Program

Where OSM takes oversight action under 30 CFR part 733 and subsequently becomes the regulatory authority for permitting activities in a State with an approved regulatory program, permit fees as established in that State program will be collected by OSM. In States where a Federal program is substituted for an existing State program under 30 CFR parts 733 and 736 because a State has withdrawn its program or OSM has withdrawn approval of the program, OSM will charge permit fees according to this fee system but will deduct an amount equal to any fees the permit applicant had already paid to the State for the permitting action. If a State regains primacy following OSM enforcement of the State or Federal program in that State, OSM will refund any permit fees that have been paid on permits not yet issued.

#### Authority for Collecting Permit fees

This permit fee system is being implemented under the authority of section 507(a) of SMCRA and section 9701 of Public Law 97-258, 98 Stat. 1051 (31 U.S.C. 9701), which prior to editorial revision and recodification was section 501 of the Independent Offices Appropriation Act (IOAA).

Section 507(a) of SMCRA provides that an application for a surface coal mining permit "shall be accompanied by a fee as determined by the regulatory authority [which] may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit . . . ."

Section 9701 of the IOAA authorizes an agency to prescribe regulations establishing the charge for a service or thing of value provided by the agency. Under section 9701 the charge shall be fair and based on the costs to the government, the value of the thing or service to the recipient, the public policy or interest served, and other relevant factors.

#### B. Section by Section Analysis of the Rule

##### Part 736—Federal Program for a State Section 736.25 Permit Fees

Section 736.25 establishes the fees to be paid to OSM by an applicant for processing an application and issuing a new permit to conduct surface coal

mining operations in States with Federal programs. Currently there are Federal programs for California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington.

#### *Section 736.25(a) Applicability*

Paragraph (a) of § 736.25 states that an applicant for a new permit to conduct surface coal mining operations under a Federal program, shall submit to OSM fees in the amounts set out in paragraph (d) of that section. It provides that the applicant shall either prepay all applicable fees by submitting them with the permit application, or shall submit the fees in partial payments by stage of review as provided in paragraphs (a)(1) through (a)(3) of the section. The rule provides that for applications submitted prior to the effective date of this rule fees shall apply only for stages of OSM review begun on or after the effective date. Where an applicant submits the fees in partial payments, OSM will not commence any stage of review until the fee for that stage has been paid.

Paragraph (a)(1) requires an applicant making payments by stage of review to submit with the application the administrative completeness review fee, as listed in paragraph (d). If the application is found to be administratively incomplete, the applicant will be notified that additional information is required, but no additional administrative completeness review fees will be charged. The proposal to collect an additional \$250 for each administrative completeness review after the initial review was not adopted, for the reasons discussed below under "Response to Comments."

Paragraph (a)(2) contains requirements for fees for the technical review of a permit application. It provides that when an applicant paying by stage of review receives notice from OSM that the permit application is administratively complete, the applicant must submit the basic and per-acre technical review fees as set out in paragraph (d). Per-acre fees according to the sliding scale in paragraph (d) must be submitted for each acre or fraction thereof of areas that would be disturbed by activities proposed in the permit application. Areas that were disturbed by previous activities and would not be redisturbed will not be assessed acreage fees. Technical review of the permit will begin upon receipt of these fees by OSM. If all permit fees are prepaid by the applicant as provided by paragraph (a), technical review will begin promptly upon completion of the administrative review and determination of

administrative completeness of the application.

If during the technical review, OSM notifies the permit applicant of technical deficiencies in the application and requests additional information, OSM will continue technical review of other sections of the application where possible while awaiting the required information. No fees will be charged for technical deficiency letters; the proposed fee of \$690 per technical deficiency letter is not adopted, for the reasons discussed below under "Response to Comments."

Paragraph (a)(3) provides for payment of the decision document fee as set out in paragraph (d). If the applicant pays by stage of review, to obtain a permit the applicant will be required to submit a decision document fee upon being notified by OSM that the permit application is technically adequate. OSM will prepare the decision document upon receipt of the applicable fee.

#### *Section 736.25(b) Refund of Fees*

Section 736.25(b) sets forth requirements for refund of fees. The proposed rule did not provide for refunds. This paragraph is added in response to commenter requests that refunds be given where permits were denied through no fault of the operator or where applications were withdrawn before a final decision was made.

Paragraph (b)(1) provides that upon written request from an applicant, OSM will refund any permit fees paid under this section for a permit application that is denied for specified reasons.

Paragraph (b)(1)(i) allows a refund when the permit is denied on the basis of information concerning endangered or threatened species or their critical habitats or information concerning cultural or historical resources, where such information was not available prior to submission of the permit application. Paragraph (b)(1)(ii) allows a refund of permit fees paid when the permit is denied because subsequent to submittal of the permit application, lands contained in the permit application are declared unsuitable for mining under Subchapter F. Paragraph (b)(1)(iii) allows a refund when the permit is denied because subsequent to submittal of the application, the applicant is denied a determination of valid existing rights to mine under 30 CFR part 761 where such rights are required to conduct surface coal mining operations on the lands contained in the permit application.

Paragraph (b)(2) provides that an applicant wishing to withdraw an application may file a written request

for withdrawal and a refund of fees in accordance with paragraph (b)(3). Paragraph (b)(3) requires OSM, upon receipt of a written request for a withdrawal, to cease processing of the application. If requested, OSM will refund fees paid by the applicant for a stage of review not yet begun by OSM and, where technical review has begun will refund paid fee amounts remaining after deduction of actual OSM costs incurred for that partial technical review. Actual costs incurred will be determined by OSM using an existing cost accounting system whereby hours spent by each reviewer in processing the action are multiplied by the hourly salary of that reviewer, with overhead costs added on to that amount. The deduction may include costs of processing the withdrawal. Paragraph (b)(4) provides that no interest will be paid on refunded fees.

#### *Section 736.25(c) Form of Payment*

Section 736.25(c) requires that all fees due under this section be submitted to OSM by the applicant in the form of a certified check, bank draft or money order, payable to Office of Surface Mining. A bank draft is a check, draft or other order for payment of money drawn by an authorized officer of the bank. The payee was proposed as "the United States" and is changed to "Office of Surface Mining" to simplify OSM's deposit procedures.

#### *Section 736.25(d) Fee Schedule for a New Permit*

Section 736.25(d) establishes the fee schedule for § 736.25.

The fee for the administrative completeness review of a new permit application is \$250. Any subsequent administrative completeness reviews necessary because of insufficient information in the permit application will not result in additional fees.

The fee for the technical review is \$1,350.00 plus acreage fees for each acre or fraction thereof of disturbed areas to be included in the permit area. There are no fees for technical deficiency letters. The proposed rule would have assessed acreage fees for all acres in the proposed permit area and a fee of \$690 for each technical deficiency letter sent to the applicant. In the final rule, acreage fees are assessed on a sliding scale, only for proposed disturbed areas in the permit application, with the first 1,000 acres subject to a fee of \$13.50 per acre, the next 1,000 at \$6.00 per acre, the next 1,000 at \$4.00 per acre, and any in excess of 3,000 acres at \$3.00 per acre.

These changes in the proposed rule were made in response to commenter

concerns about the open-endedness of the proposed fees and the possibility that some of the fees may not have been fair. Further discussion of the reasons for these changes is found under "Response to Comments," below.

The decision document fee is \$2,000.00. This fee covers the costs of OSM's preparation of all documentation necessary to issue or deny the permit and is adopted as proposed. In the event that OSM determines that the permit application must be denied, OSM may prepare the decision document even if not all fees have been paid.

On February 8, 1990, OSM proposed a reduced new permit fee for small operators (55 FR 3982). That proposal would have allowed any applicant for a Federally-processed new permit to pay a reduced fee for that permit, if the applicant could demonstrate eligibility as a small operator under 30 CFR 795.6(a) Small Operator Assistance Program eligibility requirements. The reduced fee would have totalled \$100 per permit. This proposed reduced small operator permit fee has not been adopted for the reasons set forth in the section titled "Proposed Reduced Fee for Small Operators," under "Response To Comments" below.

#### Part 750—Indian Lands

##### Section 750.12 Permit Applications

Previous § 750.12(a) is revised to conform it with other requirements of this rule. Although no changes to § 750.12 were proposed in the May 17, 1988 Federal Register notice, the February 22, 1985, notice (50 FR 7534) proposed to conform § 750.12(a) with similar requirements of that proposed rule. Previous § 750.12(a) required that applications for permits, permit revisions and permit renewals to conduct surface coal mining operations on lands subject to 30 CFR part 750, be accompanied by a fee made payable to the United States, the amount of which would be determined by the Director. Revised § 750.12(a) requires that each application for a permit to conduct surface coal mining operations on lands subject to part 750 be accompanied by fees in accordance with § 750.25 of this rule.

##### Section 750.25 Permit Fees

Section 750.25 establishes the fees to be paid to OSM for processing an application and issuing a new permit to conduct surface coal mining operations on Indian lands. OSM is the regulatory authority for such operations.

Section 750.25 parallels § 736.25 of this rule, and the preamble explanation for that section also applies to this section.

#### C. Response to Comments

Numerous comments were received on the proposed rule. The comments are grouped below according to topic.

##### General Comments

Most commenters generally opposed one or more aspects of the proposed permit application fees. Several commenters said that the rule should not be allowed to go forward. One said that a delay in instituting a permit fee would have no environmental consequences. Some commenters said that the proposal was written without any industry input. One commenter said that the proposed fees were unduly complex and would be difficult to administer.

OSM has decided to go forward with a final rule establishing application fees for new permits in Federal program States and on Indian lands, although the final rule has been revised in response to comments. Industry was given ample opportunity to comment on the initial and later proposed rules through written comments and in various hearings and meetings. OSM has carefully considered all comments in formulating this final rule. OSM does not necessarily agree that the proposed rule was unduly complex or that it would have been difficult to administer, but notes that the final rule is simpler than the proposed.

##### Is a User Fee Warranted: Who Benefits?

A number of commenters said that the proposed rule did not clearly identify the service or benefit received by a permit applicant in return for the proposed permit application fee. Several of them said that the applicant did not receive any benefit in return for the fee, and that the only benefit accrued to the general public. One commenter said that this particularly was true in the case of permit denial. Another characterized the proposed fee as a tax.

Another commenter said that an operator's mining and reclamation plans and the protection of environmental resources during and after mining under a permit were benefits most specifically accruing to the public. This commenter said that the benefit of a permit was not in the right to mine, but in the form of a service to the public, and that no immediate or substantial gain accrued to the permittee above and beyond that which served the public interest.

The same commenter concluded that the permittee's right to mine existed by reason of ownership of the coal itself, and that while SMCRA did require a permit, that permit did not confer mining rights or privileges in the sense of a license, but instead was a collection of conditions imposed upon the pre-

existing right to mine. The commenter said that these conditions were not imposed for the protection of the mine operator, but for the protection of the environment, which was a public and not a private purpose.

OSM disagrees. These commenters have misinterpreted the service for which OSM will collect the fees imposed by this rule. Contrary to the commenters' interpretations, the service is not the permit itself, but the time and money spent by OSM in processing the permit application and issuing or denying a permit. This service was identified in the February 22, 1985, proposed rule at 50 FR 7526-7527, and in the May 17, 1988, proposed rule at 53 FR 17568 and 17571. While the general public does derive an incidental benefit from the SMCRA permitting process, it is the permit applicant who initiates and derives the principal benefit from the review of a permit application and the resulting permitting decision.

As noted in the proposed rule, the United States Supreme Court has held that under section 9701 of the Independent Offices Appropriation Act (IOAA), 31 U.S.C. 9701, an agency must base a fee for a service on its value to an identifiable recipient. *National Cable Television Ass'n (NCTA) v. United States*, 415 U.S. 336 (1974); *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974).

The General Accounting Office has concluded that "[a]lthough these decisions arose under the [IOAA], the courts' [sic] reasoning appears to apply to any statute permitting an agency to assess fees." Comptroller General's Report to the Congress, PAD-80-25, 7 (March 28, 1980). Thus, it is appropriate to interpret the permit application fee requirements of section 507(a) of SMCRA in conformity with these Supreme Court decisions.

Also, in a series of contemporaneous cases interpreting these decisions, the United States Court of Appeals for the District of Columbia Circuit has specified what an agency must do to justify a particular fee. *National Cable Television v. Federal Communications Comm'n*, 554 F.2d 1094 (D.C. Cir. 1976); *Electronics Industries Ass'n v. Federal Communications Comm'n*, 554 F.2d 1118 (D.C. Cir. 1976); and *Capital Cities Communications, Inc. v. Federal Communications Comm'n*, 554 F.2d 1135 (D.C. Cir. 1976).

In *NCTA* the Supreme Court said that unlike a tax, which need not be related to any benefit,

[a] fee . . . is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or

construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

415 U.S. at 340-341. Contrary to the commenter's conclusion, a SMCRA permit is a license equivalent to those recited by the Court. Since a permit application is reviewed by OSM in response to a voluntary decision of the applicant to undertake mining operations and submit his or her application, it is proper for OSM to collect a permit application fee.

And contrary to the commenters' conclusions that it is the public, and not the applicant, who benefits from the permitting process, the United States Court of Appeals for the District of Columbia Circuit in *Electronics Industries Ass'n* has said that the second sentence of the preceding quotation:

only means that the private recipient must be "identifiable" or, to state it another way, that no fee should be charged to a private party "when the identity of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public."

554 F.2d at 1114 (emphasis in original, later quotation cited to Bureau of Budget Circular No. A-25 (September 23, 1959)). In the SMCRA permitting process the ultimate beneficiary is not obscure. The permit applicant clearly is both the cause for and the beneficiary of the time and money spent by OSM in permit application review and decisionmaking, and thus is an identifiable recipient from whom the collection of a permit application fee is proper.

Because the general public also derives an incidental benefit from the permit application process, the commenters appear to conclude that the IOAA prohibits OSM from collecting a permit application fee. Under these court decisions, however, an incidental public benefit does not preclude the imposition of a fee.

As stated by the court in *Electronics Industries Ass'n*,

it is clear that under NCTA expenditures made to benefit the public are required to be excluded from a proper fee. 415 U.S. at 341-43, 94 S.Ct. 1146. But the Court has not held that no fee can be assessed in situations which partially benefit the public.

554 F.2d at 1113 (emphasis in original). Thus, as long as the applicant receives a benefit from the permitting process commensurate with the application fee that is charged, an incidental public benefit is immaterial.

Notwithstanding simultaneous benefit to the public and a private party, courts

have upheld charging the entire cost of a service to the private party benefiting from the service. *Mississippi Power and Light v. U.S. NRC* 801 F.2d 223 (5th Cir. 1980).

The permit applicant, and not the general public, is the principal beneficiary of the permitting process for a number of reasons. First, the mining and reclamation requirements of SMCRA do not depend on the issuance of a permit, but are imposed on a permittee directly through the applicable regulatory program. Accordingly, at 30 CFR 701.5 the term *permittee* is defined to mean "a person holding or required by the Act of this chapter to hold a permit \* \* \*." (Emphasis added.) Since the environmental or other benefits provided to the public by SMCRA do not depend on the permitting process, any benefits the public receives from that process are incidental to it. Second, section 506 of SMCRA, 30 U.S.C. 1256, and the implementing regulations at 30 CFR 773.11 prohibit a person from engaging in surface coal mining operations unless that person has first obtained a permit. Since a permit applicant cannot lawfully mine without a permit, the applicant benefits from the permitting process because it enables OSM to justify and issue the necessary license to mine.

And finally, the applicant benefits from the permit application review and decision process by learning from OSM whether the proposed operation complies with SMCRA and the applicable regulatory program, or what changes are necessary to bring it into compliance. Even where a permit is denied, the applicant benefits from this process through the time and money spent by OSM in reviewing the application and noting any deficiency in the proposed operation. This process also saves the applicant the expense of commencing and then shutting down operations that would not comply with SMCRA.

Thus, OSM concludes that the benefits received by an applicant through the permitting process provide value to the applicant that is at least commensurate with the fees imposed by this rule, and that these fees comply fully with all applicable laws and regulations.

#### Applicability of the Permit Fees

A few commenters said that SMCRA does not authorize a fee for Indian lands permits and does not clearly authorize a fee for Federal lands permits. One commenter said that on Federal lands, an applicant already is compensating the Federal Government through leasing bonuses and royalties. Another said that

to mine Federal or Indian coal, an operator must pay a royalty and rental fee per acre. One commenter said that since section 710 of SMCRA requires that operations on Indian lands comply with certain SMCRA requirements (including section 507) and that the Secretary shall incorporate such provisions in leases, permit fees should be charged only for those costs that exceed the lease payment. Another saw a distinction between the benefit of being allowed to mine Federal versus fee coal.

A permit fee for Indian lands is authorized by section 710(d) of SMCRA, which requires that operations on Indian lands comply with requirements imposed by certain sections of SMCRA, including the permit fee requirements of section 507(a). For Federal lands, section 523(a) of SMCRA provides that the Federal lands program shall at a minimum include all of the requirements of SMCRA. In addition, permit fees for Federal and Indian lands are authorized by section 9701 of the IOAA.

OSM has determined that as compared to the proposed rule, applying State program fees on Federal lands in States with approved programs is more in keeping with the intent of section 523(a) that in such States the Federal lands program include at a minimum the requirements of the approved State program. (In Federal program States the fees adopted here will apply on Federal lands.) Thus, in contrast to the proposed rule, OSM has retained the provision at 30 CFR 740.13(b)(1) which applies to Federal lands the fees required by the applicable regulatory program. Proposed rule § 740.25 is not adopted.

As to royalty and rental fees paid to mine Federal or Indian coal, those fees are unrelated to the fees adopted herein. Royalty and rental fees are collected under other authorities and for purposes different from the permit fees of this rule. Thus, the payment of royalty or rental fees does not entitle an applicant to any reduction in the fees imposed by this rule.

Several commenters expressed concern that this OSM permit application fee system would be expanded to primacy States, and that as a result State grants would be phased out. Some commenters referred to a 1985 General Accounting Office (GAO) report, titled "The Department of Interior's Office of Surface Mining Should More Fully Recover or Eliminate Its Costs of Regulating Coal Mining." That report recommended that OSM and the States should recover costs to implement SMCRA through fees collected from operators, and that OSM

should phase out grants to States for coal mining regulatory programs.

One commenter said that GAO did not understand the relationship between the States and OSM, which is a working partnership with a relatively stable understanding. Another said that continued Federal funding of primacy States was certainly implied in the course of congressional deliberations on SMCRA, and is clearly the expectation of the States. The commenter said that loss of grant revenues might force States to withdraw their programs.

Some commenters felt that OSM needed to clarify that the fee system only applied in States that did not have approved State programs. A few expressed concern that OSM would apply the "no less effective" test to State permit fees and would require that States adopt similar fees to make the State program no less effective than Federal standards. One said that if OSM adopted these rules, the States would likely follow suit.

Primacy States are not required to adopt a permit fee system similar to this rule, nor is OSM considering phasing out State grants to encourage States to do so. The fees established by this rule will apply in Federal program States and on Indian lands, where OSM is exercising its discretion as the regulatory authority under section 507(a) of the Act. Because section 507(a) provides discretion to the regulatory authority in establishing the amount of a permit fee and does not require a national minimum standard, OSM does not consider the fees charged for permit applications to have a bearing on the effectiveness of a State program, and will not apply to "no less effective" test of 30 CFR 730.5 and 732.15 to permit fee requirements. This rule is not intended to be a national rule applicable to States with primacy.

One State representative recommended that the rule should apply only in those States that have chosen not to implement a State program and those States where OSM has taken action under 30 CFR part 733, and not in a State with dual permitting on Federal lands by both the State and Federal governments. A representative of another State noted that its cooperative agreement allows for issuance of a Federal permit in cases where the State permit cannot cover all Federal concerns. The commenter said that since in such cases the vast amount of the work is done by the State, Federal fees should not be assessed. Another said that even in States with cooperative agreements, OSM now spends almost as much time reviewing a permit for Federal lands as does the State regulatory authority. Another

commenter was concerned that the proposed fees might apply when OSM imposed a permit stipulation on a Federal lands permit issued by a State. This commenter said that if OSM did not intend to assess fees for permit stipulations, this should be clearly stated.

OSM agrees that the fees adopted herein should not apply on Federal lands in States with approved State programs. As stated in the discussion above regarding proposed § 740.25, which has not been adopted, OSM has determined that a fee determined in accordance with the State regulatory program is more in keeping with the intent of SMCRA section 523(a).

In a State with an approved regulatory program and a cooperative agreement giving the State permitting authority over Federal lands, permit fees will be determined by and collected by the State. If there is no cooperative agreement or the cooperative agreement provides for dual permitting by OSM and the State regulatory authority, OSM will charge the applicant the State permit fee. For Federal lands in a Federal program State, the fees in § 736.25 of this rule will apply to the entire permit area including any State, Federal and private lands. OSM will not assess fees where OSM merely imposes a stipulation on a permit issued by a State for a permit to mine coal on Federal lands.

Where OSM institutes action under 30 CFR part 733 and substitutes Federal enforcement for permitting activities in a State with an approved regulatory program, permit fees as established in that State program will be collected by OSM. Where a State withdraws its program or OSM withdraws approval of the program and OSM promulgates a Federal program, OSM will collect permit fees according to § 736.25 of this rule, but will deduct an amount equal to fees the permit applicant already has paid to the State for the same permitting action.

One commenter thought that the rule should apply only to applications filed after the effective date of the rule because OSM's proposal would be unfair to applicants who did not plan for the additional costs. As explained previously, the final rule will apply to new permit applications and to stages of OSM review begun on or after the effective date of the rule. The proposed rule, which was published May 17, 1988, gave advance notice of OSM's intent in this regard. This final rule does not become effective until 30 days after publication, which should give an applicant sufficient time to plan for additional costs.

One commenter said that the proposed fees should not apply to a permit for office buildings or support facilities, since they do not involve as much review by OSM.

The fees adopted here reflect costs incurred by OSM in processing permit applications for facilities used in support of coal operations. A number of the permits issued in Tennessee during the period of data collection were for tipplers that disturbed very few acres. Therefore, the basic \$3600 fee reflects OSM costs to process a permit for very low acreage sites. Support facilities resulting from or incident to activities in connection with mining, require a permit and thus involve processing costs. (For further discussion of the regulation of support facilities under SMCRA see 53 FR 47378-47382, November 22, 1988.)

#### Economic Effects

Several commenters were concerned about the effect of the proposal on small businesses. One questioned whether the per acre fee provided adequate protection against the competitive advantage of larger companies; another questioned whether small coal companies would be able to afford permits. Some said that application fees for a small operator with a 100 acre permit would be \$7000 to \$8000, and that this would be a significant expense. Several commenters expressed concern that permit fees could have an adverse effect on the already depressed coal industry in Tennessee. Some said that operators in States adjacent to Tennessee compete for the same market but have lower permit fees, and that Tennessee operators would not be able to pass on the costs of the permit application fees. The commenters thought that the imposition of permit fees would place Tennessee operators at a competitive disadvantage. One said that while it might be inequitable that Tennessee operators do not now pay fees, this was not the operators' fault.

Other commenters said that coal operators on Federal and Indian lands, as well as those in Federal program States, would be affected by a user fee that they considered discriminatory, and that the proposed fees would place an unfair economic burden on affected mines. Some said that a perceived unfairness of the proposed permit fee system needed to be worked out with coal operators.

Some commenters said that an underlying concept of SMCRA was to equalize competition among States and that SMCRA should not create a competitive edge in one area due to substantive regulatory differences. One

said that in some primary States, fees were much less than the proposed OSM fees, and that the proposed fees might thus violate an applicant's right to be treated equally under Federal law. One commenter raised the issue of the impact on competition from other countries and said additional costs could not be passed on in the export market.

In response to the identified concerns, OSM compared the costs of its proposed fees to those charged in other States and found that permit fees vary greatly from State to State, but that the basic fees proposed by OSM fell within the range of fees charged. However, the open-ended proposal to charge \$250 for each additional administrative completeness review and \$690 for each technical deficiency letter could have caused some permit applicants to pay such high fees, comparatively, that some competitive disadvantage may have been felt and some small operators may have been overly burdened by the fees. OSM believes that deletion of these fees from the permit fee system has resulted in fairer and more predictable permit fees that will not be overly burdensome or place some operators at a disadvantage.

For example, the fees adopted here would result in a permit fee of \$4950 for a 100 acre mine in Tennessee. In comparison, under some representative eastern State programs, the permit fee for a 100 acre mine in Ohio would be \$75 per acre, or \$7500; in Alabama, \$2500 plus \$25 per acre, or \$5000; in West Virginia, \$1000; in Kentucky, \$375 plus \$75 per acre, or \$7875; and in Virginia, \$12 per acre or \$1200.

Looking at a larger western (Federal or Indian lands) mine, the OSM fees for a 10,000 acre mine would be \$48,100. Under some representative western State programs, in Montana the fee would be \$100; in New Mexico, \$1000 plus \$15 per acre or \$151,000; in Utah the fee would be \$5; in Wyoming, where permit fees are \$100 per mine and \$10 per acre with a ceiling of \$20,000, the fee would be \$20,000; and in Texas, \$5000. These State fees do not reflect various severance taxes that some States charge which range up to 25% of the coal price.

In addressing competition aspects of the coal industry section 101(g) of SMCRA declares that:

surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations without their borders.

The permit fee system adopted here does not contradict Congress' declaration. The fees will not affect nationwide reclamation standards that insure that States will not be undermined in their ability to maintain adequate standards. OSM has determined that the impact of the Federal fee on various sized operations and in the various States does not appreciably affect the competitive balance between the States and between U.S. and export/import coal. In its Determination of Effects of Rules, (Administrative Record #7) OSM determined that the proposed fee would not be a significant cost to operators and would be a minimal cost relative to an operator's overall production costs and revenues. The Determination also concluded that the proposed rule would not adversely affect the ability of U.S. enterprises to compete in domestic or export markets.

Concerning the comment on equal treatment under Federal law, all applicants for a Federal permit are treated equally with other similarly situated applicants under this rule.

During the public comment period, OSM held meetings with representatives of the coal industry to discuss the aspects of the proposed permit fee system that some considered unfair. One meeting was held on August 3, 1988, in Knoxville, Tennessee, and another on August 19, 1988, in Denver, Colorado. In addition to concerns voiced at these meetings, OSM considered the written comments received on the initial and later proposed rules in comment letters and at the OSM and congressional hearings.

The final rule reflects changes to the proposed rules adopted in response to concerns expressed by industry and State representatives. The permit fees adopted here do not contain the proposed open-ended fees for additional administrative completeness reviews or technical deficiency letters, nor have the hourly fees proposed for permit revisions and renewals and other permitting actions been adopted. Acreage fees have been adjusted to provide a sliding scale in recognition of the large size of some mines where OSM's costs to process permits have not been commensurately large, and acreage fees will not be collected for areas that will not be disturbed.

#### Use of Tennessee Data for Nationwide Permit Fees

Several commenters said that the proposed fee structure was not appropriate for all Federal permits because it was based on limited data from Tennessee. One said that there

should be separate fee structures for Washington, Tennessee and Indian lands, reflecting local needs and conditions.

Several commenters said that the proposed rule was based on an analysis that was not representative of western coal mining and that western operations differed from those in the East because of their size, mining methods, terrain and alluvial valley floor requirements. One commenter said that alluvial valley floor analyses for surface and groundwater hydrology issues were not done in Tennessee, so a system of fees based on Tennessee data was not representative of costs in the West where these water complexities existed.

Another commenter said that the largest mine covered by the Tennessee data was 577 acres, and that in the West this would be one of the smallest mines. The commenter said that a permit application for a 64,000 acre mine currently undergoing OSM review would be assessed a fee of \$680,000 under the proposed rule. This commenter and others said that OSM should suspend this rulemaking until OSM undertakes an analysis of the impacts of the proposed fees on western mines.

One commenter said that separate fees should be used for the East and West, and suggested a semiarid/arid split or division of east and west of the 100th meridian. Another commenter suggested separate fee structures for surface and underground mines.

In developing the proposed fee system OSM used Tennessee data mainly because it best reflects OSM costs to process permits. OSM sought to avoid the actual cost reimbursement method of collecting permit fees, which was proposed on February 22, 1985 (50 FR 7522). Since very few permanent program permits have been issued by OSM in other Federal program States or on Indian lands, OSM has little data for those mines on which to base a fixed fee. In the face of this current lack of data, the only other alternative immediately available is an actual cost reimbursement fee as proposed in February 1985. Although OSM has not completely foreclosed the possibility of adopting such a proposal at some future time, the fixed fees in this final rule are currently the preferable alternative until better data become available.

OSM notes that the differences between eastern and western mines mentioned by the commenters concerning hydrology and alluvial valley floors would tend to increase the complexity of the western permit application reviews and therefore increase OSM's processing costs; and

that other factors may tend to decrease processing costs per acre as acreage increased. OSM has made adjustments in this final rule from the proposed to recognize east/west differences. In the final rule OSM has used a sliding scale of acreage fees to account for the larger size of western mines. Also, acreage fees will be assessed only for permit areas of planned disturbances. This is discussed further below under the section heading "Per-acre Fees and Full Cost Recovery." Based on cost data for the western mines for which OSM has issued permits, permit fees under this final rule will not exceed the costs of processing the permit applications for western mines.

In structuring the proposed and final rules, OSM considered separate fees for underground and surface mine applications but found that variations in costs of processing these types of mining applications are adequately reflected in acreage fees.

Some commenters questioned the efficiency of OSM's permit review activities and the experience of its staff. Several said that OSM should look at costs incurred by other more efficient State or Federal agencies. One commented that the Knoxville office takes too long to review permits and issues too many technical deficiency letters. One commenter suggested that OSM study the Bureau of Land Management right-of-way fees.

OSM concedes that its reviewers set high standards for the quality of permit application reviews and that this may tend to lengthen the processing time. OSM does not agree that this results in inefficient reviews. OSM also notes that there often are disagreements between the agency and permit applicants concerning technical issues, and that different technical experts reasonably can disagree on certain issues. OSM has considered Bureau of Land Management fees as well as fees charged by other Federal agencies but has determined that the fee system in this final rule is more appropriate for OSM purposes.

One commenter said that OSM's only source of nationwide data, a February 6, 1987 OSM memorandum (Administrative Record #9), showed that the highest cost for review of a western surface mining permit application was \$59,376. The commenter said the proposed fees would be much higher. The commenter said that the median cost for permit review according to the memorandum was \$6,000, and that OSM's proposed fees should be adjusted to result in a ceiling closer to that amount.

OSM does not agree that the median cost of permit application review should

represent the upper limit on permit fees. The median cost represents the middle value on a distribution of values. This rule includes an acreage fee that results in a permit fee that reflects the higher permit processing costs accrued for large mines and the lower costs accrued for small mines. Use of the median value as an upper limit on fees would not be advisable under this fee system, because the system is designed to reflect the upper limits of OSM processing costs, as well as the lower costs.

More current data from western mines indicate that OSM's costs have far exceeded the \$59,376 cited by the commenter. For example, OSM costs to review the Black Mesa/Kayenta mine in Arizona have exceeded \$195,000, not including NEPA costs, and permit review is not yet complete. OSM believes that the permit fees adopted today are more realistic than the alternatives suggested by the commenter, in reflecting OSM review costs.

#### Pre-collection and Refundability of Fees

Several commenters expressed concern about the proposal to require prepayment of fees before each stage of permit application review. One commenter said that having to pay separate fees for each stage of review would increase bookkeeping costs. Another commenter said that if a technical deficiency letter were sent and the permit review process delayed until the fee was paid, this would lengthen the review process. Some commenters said that requiring prepayment for the decision document would preclude processing of that document until late in the permit review process. One said that since preparation of the decision document now generally occurs concurrently with permit review, the proposal would lengthen the process of obtaining a permit.

Another commenter said that OSM should consider a permit fee system similar to Indiana's, where the acreage fee is not paid until satisfactory completion of the technical review. One commenter suggested that fees be collected after permit application review is complete. Two commenters suggested that OSM should consider allowing an applicant to pay fees in five annual payments or incrementally as the permit area was bonded. Three commenters objected to the proposal that all fees would be non-refundable even if the permit were denied.

The proposed rule provided that the fee for each stage of permit application review must be paid before OSM commenced that stage. The final rule gives the applicant the option of paying

all fees upon submission of the application (\$3,600 plus acreage fees), so that there will be no delays caused by the time lag between OSM's notification of fees due and receipt of payment. An applicant concerned about bookkeeping costs can keep those costs down by prepaying the entire fee. However, an applicant still has the option of making partial payments before each stage of review, as in the proposed rule.

As proposed, the final rule does not allow payment of the permit application fees over the term of the permit or after review is complete. The fees should not be prohibitive even for small operators, and the administration of a deferred payment system would be costly to OSM and could result in higher fees to compensate for the added costs. The final rule allows OSM to refund some fees to the applicant under certain conditions as discussed under "Section 736.25(b) Refund of Fees" above.

The proposed rule provided that if a technical deficiency letter were sent, technical review of the application would cease until an additional fee of \$690 was paid and the applicant responded to the issues raised in the letter. The final rule does not assess additional fees for technical deficiency letters and does not require that the technical review cease while OSM awaits a reply on technical deficiencies. To the extent possible, technical review of the application will continue while OSM is waiting for the requested information.

One commenter responded to OSM's request for comments on the possibility of pre-collecting hourly fees. This commenter was against pre-collection because there were not enough data to accurately estimate the number of hours that might be necessary for OSM review, and delays could result if the estimated hours were exceeded. The commenter also said that OSM should pay interest on any excess money that would be refunded if hours were over-estimated.

The issue of pre-paying hourly fees is no longer relevant since hourly fees are not adopted in this final rule.

#### Open-ended Permit Fees

Several commenters said that the proposed fee structure contained too much uncertainty for the applicant and no incentive for efficiency by OSM. They objected to the open-ended nature of the proposal to charge fees for additional administrative completeness reviews and technical deficiency letters and the proposal to charge hourly fees for certain permitting actions. Some commenters said that they would be

unable to determine the amount of fees they would be required to pay until the end of the review process. The commenters said that an operator could not reasonably estimate fees prior to submitting an application, and therefore could not assess the economic feasibility of the proposed operation, or control costs. One commenter said that there was no assurance of reasonableness in the proposed fee amounts, since the proposal included no provision for monitoring costs and no ceiling on the fees that might be assessed.

OSM considered comments received on the February 22, 1985, proposed rule in developing the May 17, 1988, proposed rule. Most of the industry commenters on the actual cost reimbursement provision of the initial proposed rule objected that under that system the permit fee would be an unknown expense, and therefore an applicant would not be able to project the cost of doing business. In the May 17, 1988, proposed rule, OSM said that the proposed fee system would enable an applicant to determine in advance the cost of a permit. After reviewing the comments on the May 1988 proposed rule, OSM concedes that advance determination of costs would not necessarily have been possible under the proposal, and the final rule contains no open-ended costs. The final rule includes only a fee system for new permits. It requires a one-time fee for an administrative completeness review, a basic technical review fee plus acreage fees, and a decision document fee. All fees are pre-determined and no fees will be charged for additional administrative completeness reviews or technical deficiency letters. Thus, the fee for a new permit application will be \$3,600 plus acreage fees. There are no hourly fees in the rule.

#### Technical Deficiency Letter Fees

Many commenters objected to the proposal to charge an additional fee for each letter sent to notify an applicant of technical deficiencies in a permit application. Several commenters said that technical deficiency letters were often subjective and reflected the bias of the reviewer. Other commenters said that allowing OSM to charge for technical deficiency letters gave the reviewer no incentive for efficient review. One said that technical deficiencies often could be better resolved by a phone call or by a more careful review of the information in the permit application, and that the proposed system would not encourage this type of solution. One commenter said that even charging for only a

limited number of letters with a limit on fees would not be fair because the amount of scrutiny a permit application receives would differ from reviewer to reviewer.

Several commenters said that \$690 was too high a fee for a technical deficiency letter because some of these letters pointed out only minor deficiencies.

One commenters said that operators were submitting much more accurate permit applications now than a few years ago and that grossly deficient permits were no longer a problem. Another said that an applicant would not intentionally submit a deficient application and that the applicant was interested in obtaining a permit as soon as possible.

Some commenters objected to the proposal that if a technical deficiency letter were sent, the review of the application would stop until the technical deficiency fee was paid, thus lengthening the review process. One said that sending a deficiency letter for each technical area would speed up the process but would be very expensive if \$690 were charged for each letter. One suggested an alternative whereby the technical review of only that portion of the application for which information was requested would stop. The commenter said that if this alternative were not adopted, OSM should require a one-time only payment at the time the applicant submitted the fee for the decision document. This commenter also stated that OSM should clarify whether an operator could obtain a refund of the technical deficiency letter fee if he prevailed on appeal.

The numerous comments on this aspect of the proposed rule persuaded OSM that technical deficiency fees should not be adopted at this time and that further study of such fees will be necessary.

The rule does not require that all technical deficiencies be identified in a single letter or that technical review cease until a response is received to any technical deficiency letter sent. Technical review of other parts of an application will continue, if possible, while OSM is waiting for the information requested in a technical deficiency letter. These changes eliminate the open-endedness of the proposed technical deficiency letter fee and the potential for unnecessary delay of permit application review while OSM awaits responses to technical deficiency letters.

One commenter said that OSM should develop a uniform permit application form. The commenter said that this

would minimize the need for multiple administrative completeness reviews and technical adequacy reviews because the applicant would know exactly what was needed in the permit application. Otherwise, the commenter said, the permit fee would be arbitrary and capricious since there were no objective standards.

OSM disagrees that a uniform permit application form is required to let an applicant know exactly what is needed in a permit application. Permit application requirements are set out in detail in 30 CFR parts 773 through 785.

#### Per-acre Fees and Full Cost Recovery

Many commenters objected to the proposed fee of \$13.50 for each acre of land in the permit area. One said that fees based on acreage were inherently unfair because more agency time could be spent reviewing an application for a smaller mine than for a larger mine, and that the fees collected for reviewing an application for a large mine could exceed actual costs. Another commenter said that fixed acreage fees would discourage submittal of life-of-mine plans and that the cost to review an application was not necessarily proportional to the acreage.

One commenter said that while the proposed acreage fee was based on the assumption that a fixed amount of time or cost was expended for every acre, there would be economies of scale for larger western mines, where the geology and hydrology would remain somewhat uniform over large areas. Several commenters said that some acreage within the permit area was not disturbed during mining and therefore should not add to the cost of permit review.

Several commenters gave as an example a 64,000 acre mine on Indian lands in Arizona that would have cost \$880,000 to permit under the proposed fee system. One commenter said that this amount would be more than a hundred times greater than the average fee in Tennessee, and that the permit processing costs to OSM would not be a hundred times greater. One commenter gave as another example a 5,436 acre mine that would have cost \$73,000 to permit under the proposed fees. One said that these fees would violate SMCRA section 507(a) which requires that the fees shall not exceed OSM's actual or anticipated costs of reviewing, administering and enforcing a permit.

Several commenters suggested that a ceiling should be placed on acreage fees. One said that the per-acre fee should not apply to permit renewals or revisions. Another objected to the per-

acre rate of \$13.50 as excessive for western mines and suggested a cap of \$1,000 for such fees or a sliding scale that decreased as acreage increased. One commenter asked OSM to identify the economic impacts of the large fees that could result from the proposal.

Two commenters offered alternative fee schedules for consideration. The first included one per-acre fee for an environmental description review and another for the mining and reclamation plan review. Under this alternative, fees would apply the first time proposed operations for an area were reviewed, whether this was part of the initial permit application, a subsequent renewal, or a major modification. The acreage fee for mining and reclamation plan review would cover all disturbed land, including but not limited to, mining areas, facilities, roads, stockpiles, ponds, etc. A sliding scale of \$5 per acre for the first 1,000 acres, \$4 for the next 1,000, \$3 for the next 1,000, \$2 for the next 1,000, and \$1 for all remaining acres would be applied. The commenter thought that this sliding fee would be advantageous to the regulatory authority because it would encourage the applicant to describe as much of the life-of-mine area as possible in the first permit application, while the rule proposed by OSM did not encourage this because of the flat per-acre fee. The commenter said that this alternative would also provide the applicant with a known, quantifiable cost.

The second commenter's alternative fee schedule would have placed a 300 acre cap on the acreage fee, so that the maximum fee would have been \$7,850 (\$3,800 plus  $\$13.50 \times 300$ ). The commenter stated that if this modification were not accepted, OSM should consider distinct acreage fees for coal extraction and non-coal extraction areas. The commenter suggested that OSM collect four percent of the per-acre fee for non-coal extraction areas (\$.50), similar to the Illinois practice.

OSM agrees that these commenters have valid concerns over the large fees that might result in some cases from a fee of \$13.50 for every acre of land in the permit area. OSM also agrees that some economies of scale may exist in the review of permit applications for very large mines. However, the large size of some mines also increases the complexity of technical reviews. In the final rule, OSM has adopted a sliding scale acreage fee that will apply only to proposed disturbed areas within the permit area, that is, areas that will be disturbed by the activities proposed in the permit application. The acreage fee will be \$13.50 per acre for the first 1,000

acres, \$6.00 per acre for the next 1,000, \$4.00 per acre for the next 1,000 and \$3.00 per acre for any remaining acres or fraction thereof. Per-acre fees will not apply to previously disturbed areas that will not be redisturbed under the permit. No fees are adopted for permit renewals or revisions, although OSM may repropose fees for these actions at a later date.

OSM compared the acreage fees that would result under this rule to its permit processing costs for four western mines, and determined that these fees would not exceed OSM processing costs. For these four western mines based on actual cost data, the costs incurred were (rounded to the nearest \$100): \$42,500 for the Centralia mine disturbing 8,131 acres; \$54,300 for the John Henry mine disturbing 363 acres; \$34,500 for the LaPlata mine disturbing 107 acres; and \$108,800 for the McKinley mine disturbing 11,368 acres. Under this rule the fees for those permit processing actions would have been: \$42,500 for the Centralia mine; \$8,500 for the John Henry mine; \$5,045 for the LaPlata mine; and, \$54,204 for the McKinley mine.

OSM notes that the 64,000 acre Indian lands mine cited by several commenters includes vast acreage that will not be disturbed by mining activities and therefore would not be assessed acreage fees under this final rule. OSM estimates that if these permit fees were applied to the mine cited, the fee would be \$75,100, which is below OSM costs incurred so far (approximately \$195,000 excluding NEPA costs) to process the permit for that mine.

OSM appreciates the submission of the alternative fee systems for its consideration. OSM believes that the first system which would divide the fee between review of the environmental description and the mining and reclamation plan may be administratively burdensome. However, OSM agrees that the commenter's suggestion of a sliding acreage fee has merit and has included a similar system in the final rule.

The second system, with a 300 acre cap on acreage fees, has merit in its simplicity but would be unfairly weighted toward applicants proposing to mine areas of more than 300 acres. This commenter's alternate suggestion of a lower fee for non-coal removal areas is adopted with modification. Under this rule, acreage fees will be assessed for areas of planned disturbance only, rather than making a distinction between areas where coal is removed or is not. This approach was adopted because the disturbance of non-coal-removal areas adds to the cost of

reviewing a permit application for the impacts of these disturbances.

Several commenters questioned OSM's proposal to seek full cost recovery. Some commenters said that SMCRA does not require full cost recovery and that the benefit to the public should be considered.

The final rule does not provide for full cost recovery. While section 507(a) of SMCRA authorizes OSM to recover its costs to review, administer and enforce the permit the fees in this rule will recover the greater part, but not all, of OSM costs to process a permit application and issue the permit.

#### Decision Document Fees

One commenter said that the proposed fee of \$2000 for preparing the decision document was too high since most of the required findings would have been made during the technical review. Two commenters were concerned about prepaying before each stage of permit application review, particularly for the decision document. They said that this requirement would preclude OSM from processing the decision document until late in the permit review process. The commenters said that preparation of the decision document generally occurred concurrently with the permit review process, and that a requirement for payment of a fee before preparation of the document would lengthen the process of obtaining a permit. The commenters said that, since most of the material for the decision document was taken from the permit application, the fee was too high for the effort.

The fee schedule in this rule is based on an analysis of data collected through OSM's cost accounting system for permits issued in Tennessee. This analysis showed that the cost of preparing the decision document is approximately \$2000.

Regarding preparation of the decision document concurrently with the technical review, preparation of the decision document begins after a determination of technical adequacy is made. This rule will not greatly affect the timing or manner of OSM's preparation of decision documents.

#### Hourly Fees

The proposed rule included application fees for permit renewals and revisions, the transfer, assignment or sale of rights under an existing permit, and coal exploration permits, at an hourly rate of \$24.00 for each hour spent by OSM reviewers in processing the applications. Hourly rates were proposed for these actions due to the

great variation in their processing costs and/or insufficient data to validate a fixed fee.

Most commenters objected to the proposed hourly fees. Some said that hourly fees would encourage inefficiency, and that their effect would be to diminish channels of communication for effective interchange of information. One commenter said that hourly fees could create conflicts of interest and a desire on OSM's part to maximize revenues. Some said that since the proposed hourly fees were open-ended, an applicant could not budget for them and would have neither control over nor prior knowledge of what costs might be incurred in the review process.

One commenter objected to the fact that the proposed hourly fees included overhead costs which could vary in different offices. Another commenter thought that the rule should be revised to make it clear that the hourly rate did not apply to new permit applications. Several commenters said that the hourly rate should have a ceiling when applied to renewals, revisions or transfers.

Several commenters raised concerns about the accounting system to be used by OSM to document the hours spent in processing permitting actions. One said that the applicant would be billed for a certain number of hours, but would have no way to question or audit the bill. Another questioned whether OSM had an adequate accounting system in place and whether OSM was prepared to provide full and complete documentation of its charges. Several commenters also wanted to know who had the burden of proof to justify or refute charges, and whether there would be an appeal process.

Several commenters said that hourly fees for revisions would discourage operators from seeking revisions that would cost them money. They said that operators would be reluctant to apply for revisions because of the unknown expense, since the number of hours for review could not be known in advance. The commenters said that this would impede information flow between operators and OSM. The commenters said that some revisions improved efficiency, recovery or reclamation success and kept OSM informed of changes in the mining plan, and that OSM should not discourage these revisions by charging fees for them.

Some commenters said that review of permit revisions could be very time-consuming and therefore very costly to operators under the proposed rule. One said that a current revision his company was requesting had already taken ten months for OSM to review, and that fees

for this revision would have amounted to \$30,000 under the proposed rule. One commenter said most revisions were minor and should not be subject to a fee. One said that even good permits were revised frequently. Another said that there should be a flat fee for revisions. One said that revision fees could exceed the original permit fees.

Some commenters said that fees should apply only for significant permit revisions and not for minor revisions. One commenter said that operators should not be required to pay for revisions caused by regulatory uncertainty. Two commenters said that there should be no charge for permit renewals or revisions unless acreage was added to an existing permit. One added that for revisions, the fee should consist of only the acreage fee times the number of additional acres, plus the administrative completeness review fee.

Another commenter said that an hourly fee applied to permit renewals, revisions, transfers and assignments with controversial hydrology issues would be very costly. Another commenter said that the transfer, assignment and sale of permits were essentially administrative functions, and that instead of hourly fees, OSM should impose only an administrative completeness review fee.

One commenter objected to additional fees for the successive renewal of a permit for previously reviewed areas. Another commenter objected to the proposed hourly charge for permit renewals because under SMCRA each permit carried with it a right of successive renewal. This commenter said that OSM's rationale for not charging fees for mid-term permit review also should apply to permit renewal.

One commenter said that SMCRA did not authorize a fee for coal exploration permits and recommended that if OSM imposed such a fee it should be fixed, not hourly. Another commenter said that under the Tennessee program, coal exploration notices were not reviewed but were for information only.

The final rule does not include hourly fees or any fees for permit renewals or revisions, for the transfer, assignment or sale of rights under an existing permit, or for coal exploration permits. OSM is persuaded by these comments that further study of potential fees for these actions is necessary and will conduct such a study over the coming year. OSM plans to repropose fees for these actions following that study where the study results indicate such fees are justified and collection is feasible.

#### Proposed Reduced Fee For Small Operators

On February 6, 1990, OSM reopened the comment period on the proposed Federal permit fees rulemaking for the narrow purpose of soliciting comment on a proposed reduced new permit fee for small operators (55 FR 3982). The proposal would have allowed any applicant for a Federally-processed new permit to pay a reduced fee for that permit, if the applicant could demonstrate eligibility as a small operator under 30 CFR 795.6(a) Small Operator Assistance Program eligibility requirements. The reduced fee would have totaled \$1000 per new permit.

The proposed reduced fee for small operators is not adopted in this final rule. OSM has determined that the final rule provides a fair and equitable fee system that reflects respective sizes of operations in the acreage fees, and that the fees as contained in this final rule should not be burdensome for small operators.

Seven parties commented on the proposed reduced small operator fee.

Two commenters expressed support for a small operator fee. One said that the tonnage production limit for small operators should be raised to 500,000 tons per year, rather than 100,000 tons per year. The other supported a reduced fee because of the cost savings it would afford to small operators and because operators could better plan financial investments with a fixed fee. The commenter encouraged the fixed fee approach for all Federal fees.

OSM is not adopting the reduced small operator fee and therefore did not consider changing the tonnage limits for the purpose of small operator permit fees. Regarding cost savings and the ability to plan financial investments, OSM believes the final permit fee schedule represents a fee that small operators can afford and that will enable better planning of financial investments because it is a known fixed fee. The total fee will be \$3600 plus acreage fees. For a small operator disturbing fifty acres the fee would be \$4275. There are no extra charges for deficiencies.

One commenter felt that the proposal to recuperate fees from operators who had qualified as small operators but whose production subsequently exceeded the 100,000 ton limit should not be adopted. The commenter thought this provision would act as a deterrent to growth. Since the reduced fee for small operators is not adopted, this comment is moot.

Two commenters said that OSM had not justified the need for a separate fee for small operators. They questioned whether operators who could not pay permit fees would be able to pay reclamation costs. The commenters said a small operator fee would introduce in unfair advantage for small operators who already have assistance through the Small Operator Assistance Program. They said that OSM should not continue to grant incentives to one group at the expense of another. These commenters said that the proposal contradicts the stated purpose of the original (May 1988) rulemaking to offset permitting costs. These commenters asked who would pay the additional costs to track operator production to determine whether an operator loses small operator eligibility.

OSM believes that it has the authority to include a reduced fee for small operators in its permit processing fee system. The legislative history indicates that small operators were a concern in establishing the requirement for fees to accompany a permit application. However, since the fees adopted today do reflect relative sizes of mining operations in the acreage fees, and since the fees should not be overly burdensome even for small operators, no reduced fee for small operators has been adopted.

The Ohio Department of Natural Resources (DNR) commented that under Ohio's permit fee of \$75 per acre, a typical fifty-acre small operator would pay \$3750 for a permit. The Ohio DNR said that a small operator fee of \$1000 would result in a significant loss of revenues and that its current fee structure is reasonable and equitable. The Utah DNR also objected to the proposed small operator fee saying that a reduced small operator fee would provide an incentive for piecemeal permitting. The Utah DNR said that a lump sum fee assumes the same permit review effort regardless of location or type of mine.

The permit fee schedule adopted here will not apply in States with approved programs such as Ohio and Utah. States will not be required to adopt similar schedules. OSM does not necessarily agree with the Utah DNR's assessment that a reduced small operator fee would encourage piecemeal permitting since the costs of completing a permit application tend to be much higher than the costs to obtain permit processing, and economies of scale can be realized by completing an application for a larger mine rather than several small ones. In response to Utah's comment that a uniform small operator fee assumes the

same permit review effort for all small mines: a uniform reduced fee for small operators was not intended to be reflective of costs incurred, but rather would have been a cost savings consideration granted to small operators. However, OSM has declined to include a reduced small operator fee in its final fee schedule.

One commenter said that OSM had not identified in the rulemaking the criteria for qualifying as a small operator. The commenter assumed operators producing 100,000 tons of coal per year would qualify but said that this was not stated. This commenter said it should not be a regional or State-by-State decision on who should qualify. OSM identified the criteria at 30 CFR 795.6(a) as the criteria to be applied in determining who would qualify for a reduced small operator permit fee; however, since the proposed reduced small operator fee is not adopted both points stated by the commenter become moot.

One commenter suggested an alternative small operator fee that would collect \$1000 from operators producing up to 100,000 tons per year, \$1000 plus \$7.25 per acre for operators producing 100,001 to 300,000 tons, and \$1000 plus \$13.50 per acre to operators producing 300,001 to 500,000 tons per year.

OSM appreciates the commenter's suggestion but is not adopting a reduced fee for small operators. The final fee schedule adopted here provides a fixed fee that reflects relative sizes of operators and OSM costs to process a new permit.

A few comments were received that pertained to OSM's proposal to charge permit fees, as a whole. These comments are not addressed because the comment period that extended from February 7 through March 8, 1990, was opened only to comments pertaining specifically to a proposed reduced fee for small operators.

### III. Procedural Matters

#### *Effect in Federal Program States and on Indian Lands*

Section 736.25 of this rule applies in those States with Federal programs. These are California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. Sections 750.12 and 750.25 apply on Indian lands.

### *Federal Paperwork Reduction Act*

This rule does not contain information collection provisions which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

### *Executive Order 12291 and Regulatory Flexibility Act*

The DOI has determined that this is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

Of the nearly 7,000 active mining operations in the United States, the majority (over 95%) are governed by State programs, and not affected by the rule. Most of the operations in the minority potentially affected by the rule already have surface coal mining permits. Given the anticipated number of applications for permits for new operations processed annually by OSM, the anticipated fees are expected to fall below the criteria established by the Executive order. Against this background of limited activity, the Department has concluded that the rule will not have an annual effect on the economy of \$100 million or more, or result in a substantial increase in costs or prices for the Federal government, consumers, individual industries, State or local government agencies, or geographic regions.

### *National Environmental Policy Act*

OSM has prepared an environmental assessment (EA) of this final rule, and has made a finding (FONSI) that it will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The EA and FONSI are on file in the OSM Administrative Record at 1100 L Street, NW., Room 5131, Washington, DC 20240.

### *Author*

The principal author of this rule is Adele Merchant, Chief, Branch of Federal and Indian Programs, OSM, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 208-2533 or FTS 288-2533.

### *List of Subjects*

#### *30 CFR Part 736*

Intergovernmental relations, Surface mining, Underground mining.

## 30 CFR Part 750

Indians—lands, Reporting and recordkeeping requirements, Surface mining.

Accordingly, 30 CFR parts 736 and 750 are amended as set forth below:

Dated: June 27, 1990.

David O'Neal,

Assistant Secretary, Land and Minerals Management.

## PART 736—FEDERAL PROGRAM FOR A STATE

1. The authority citation for part 736 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

2. Section 736.25 is added to read as follows:

## § 736.25 Permit fees.

(a) *Applicability.* An applicant for a new permit to conduct surface coal mining operations under a Federal program shall submit to OSM fees in the amounts set out in paragraph (d) of this section. For applications submitted prior to the effective date of this rule, fees shall apply only for stages of OSM review begun on or after the effective date. The applicant shall either submit all applicable fees with the permit application, or by stage of review as follows:

(1) *Administrative completeness review.* An applicant who pays by stage of review shall submit the administrative completeness review fee with the permit application.

(2) *Technical review.* Following receipt from OSM of a notice of administrative completeness, an applicant who pays by stage of review shall submit the technical review basic fee, plus the per-acre fee for each acre of disturbed area or fraction thereof to be included in the permit area.

(3) *Permit issuance.* Following receipt from OSM of a notice of technical adequacy, an applicant who pays by stage of review shall submit the decision document fee.

(b) *Refund of fees.* (1) Upon receipt of a written request from an applicant, OSM will refund any permit fees paid under this section for a permit application when OSM denies the permit:

(i) On the basis of information concerning endangered or threatened species or their critical habitats or information concerning cultural or historical resources, where such information was not available prior to submission of the permit application;

(ii) Because subsequent to submittal of a permit application, the lands

contained in the permit application are declared unsuitable for mining under subchapter F of this chapter; or

(iii) Because subsequent to submittal of a permit application, the applicant is denied valid existing rights to mine under part 761 of this chapter where such rights are required for surface coal mining operations on the lands contained in the permit application.

(2) An applicant may file a written request for withdrawal of a permit application and a refund of fees in accordance with paragraph (b)(3) of this section.

(3) OSM will, upon receipt of written request for withdrawal of a permit application, cease processing of that application. If requested, OSM will refund fees paid by the applicant for the withdrawn application as follows:

(i) Any fees for a stage of OSM review not yet begun will be refunded;

(ii) Where technical review has begun, partial refund will be made of any technical review fee amounts remaining after deduction of actual OSM costs incurred for that technical review. Costs to process the withdrawal may also be deducted.

(4) No interest will be paid on refunded fees.

(c) *Form of payment.* All fees due under this section shall be submitted to OSM by the applicant in the form of a certified check, bank draft or money order, payable to Office of Surface Mining.

(d) *Fee schedule for a new permit.*

Administrative completeness review.	\$250.00
Technical review:	
Basic fee.....	1350.00
Fee per acre of disturbed area in permit area:	
First 1,000 acres.....	13.50/acre
Second 1,000 acres.....	6.00/acre
Third 1,000 acres.....	4.00/acre
Additional acres.....	3.00/acre
Decision Document.....	2000.00

## PART 750—INDIAN LANDS PROGRAM

3. The authority for part 750 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

4. Section 750.12 is amended by revising paragraph (a) to read as follows:

## § 750.12 Permit applications.

(a) Each application for a permit to conduct surface coal mining operations on lands subject to this part shall be accompanied by fees in accordance with § 750.25 of this part.

• • • • •

5. Section 750.25 is added to read as follows:

## § 750.25 Permit fees.

(a) *Applicability.* An applicant for a new permit to conduct surface coal mining operations on lands subject to this part shall submit to OSM fees in the amounts set out in paragraph (d) of this section. For applications submitted prior to the effective date of this rule, fees shall apply only for stages of OSM review begun on or after the effective date. The applicant shall either submit all applicable fees with the permit application, or by stage of review as follows:

(1) *Administrative completeness review.* An applicant who pays by stage of review shall submit the administrative completeness review fee with the permit application.

(2) *Technical review.* Following receipt from OSM of a notice of administrative completeness, an applicant who pays by stage of review shall submit the technical review basic fee, plus the per-acre fee for each acre of disturbed area or fraction thereof to be included in the permit area.

(3) *Permit issuance.* Following receipt from OSM of a notice of technical adequacy, an applicant who pays by stage of review shall submit the decision document fee.

(b) *Refund of fees.* (1) Upon receipt of a written request from an applicant, OSM will refund any permit fees paid under this section for a permit application when OSM denies the permit:

(i) On the basis of information concerning endangered or threatened species or their critical habitats or information concerning cultural or historical resources, where such information was not available prior to submission of the permit application;

(ii) Because subsequent to submittal of a permit application, the lands contained in the permit application are declared unsuitable for mining under subchapter F of this chapter; or

(iii) Because subsequent to submittal of a permit application, the applicant is denied valid existing rights to mine under part 761 of this chapter where such rights are required for surface coal mining operations on the lands contained in the permit application.

(2) An applicant may file a written request for withdrawal of a permit application and a refund of fees in accordance with paragraph (b)(3) of this section.

(3) OSM will, upon receipt of written request for withdrawal of a permit application, cease processing of that application. If requested, OSM will refund fees paid by the applicant for the withdrawn application as follows:

(i) Any fees for a stage of OSM review not yet begun will be refunded;

(ii) Where technical review has begun, partial refund will be made of any technical review fee amounts remaining after deduction of actual costs incurred for that technical review. Costs to process the withdrawal may also be deducted.

(4) No interest will be paid on refunded fees.

(c) *Form of payment.* All fees due under this section shall be submitted to OSM by the applicant in the form of a certified check, bank draft or money order, payable to Office of Surface Mining.

(d) *Fee schedule for a new permit.*  
Administrative completeness \$250.00  
review.

Technical review:

Basic fee..... 1350.00

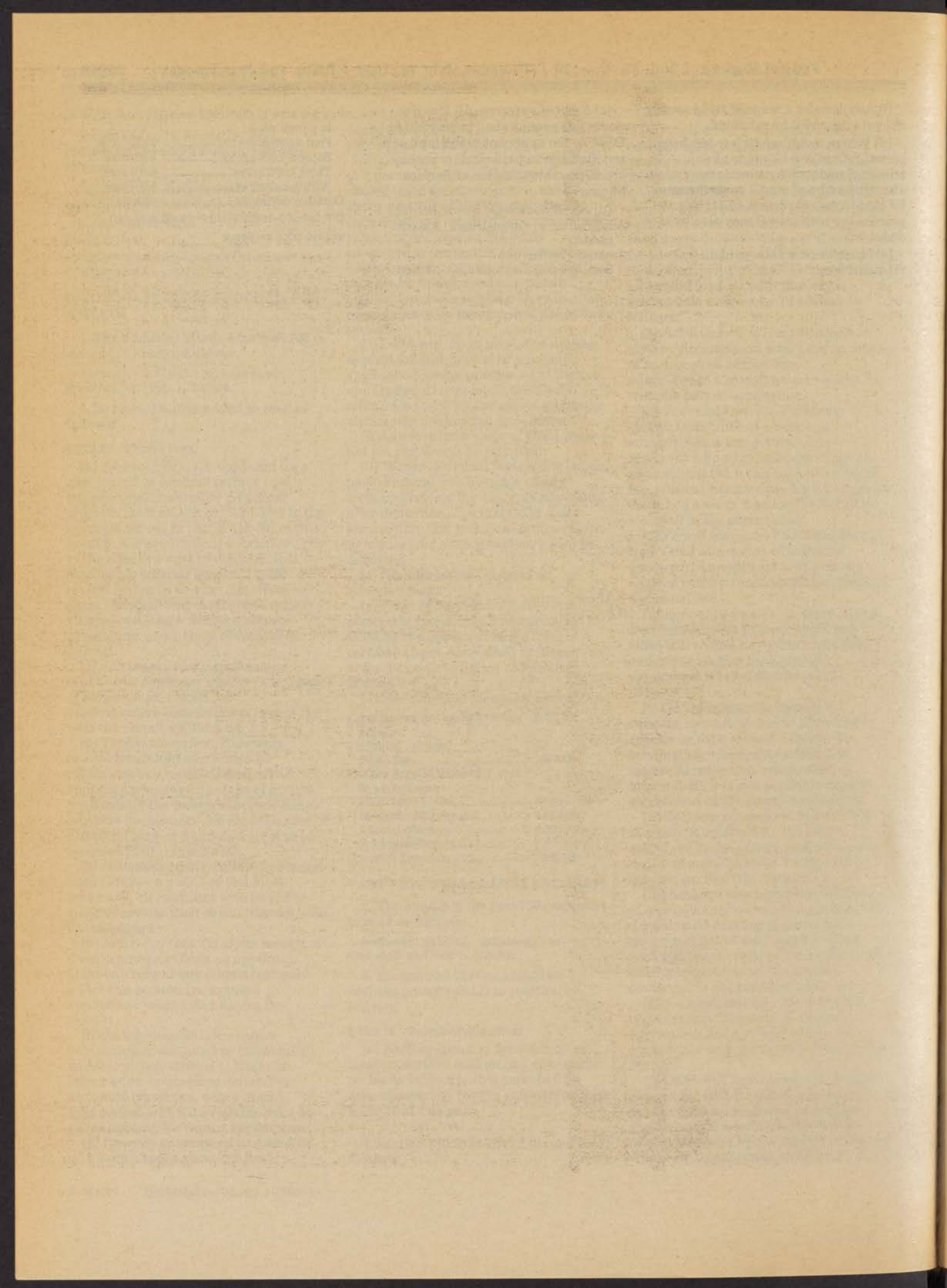
Fee per acre of disturbed area  
in permit area:

First 1,000 acres..... 13.50/acre  
Second 1,000 acres..... 6.00/acre  
Third 1,000 acres..... 4.00/acre  
Additional acres..... 3.00/acre

Decision document ..... 2000.00

[FR Doc. 90-16800 Filed 7-18-90; 8:45 am]

BILLING CODE 4310-05-M



# Test Report Federal Register

---

Thursday  
July 19, 1990

---

## Part V

### Department of Transportation

---

Federal Aviation Administration

---

14 CFR Part 91

Night-Visual Flight Rules Visibility and  
Distance From Clouds Minimums; Final  
Rule

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 91

[Docket No. 24722; Amdt. 91-213]

RIN 2120-AB04

## Night-Visual Flight Rules Visibility and Distance From Clouds Minimums

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; amendment.

**SUMMARY:** On September 29, 1989, the FAA issued a final rule establishing standard visibility and cloud clearance minimums for night-visual flight rules (VFR) operations. This final rule amends § 91.105 (§ 91.155) to add paragraphs which were inadvertently omitted in that final rule. This rulemaking action is necessary to facilitate implementation of the final rule issued on September 29, 1989. This final rule will clarify regulatory requirements.

**EFFECTIVE DATE:** Section 91.105 is effective July 19, 1990. Section 91.155 is effective August 18, 1990.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Davis, Air Traffic Rules Branch, ATP-230, Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-8783.

## SUPPLEMENTARY INFORMATION:

## Availability of Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-200, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the amendment number identified in this final rule. Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

## Background

When Amendment No. 91-213 (Docket No. 24722) was published in the Federal

Register on September 29, 1989, certain text, consisting of three paragraphs of the existing rule, was inadvertently omitted. In order to restore the text to its intended form, it is necessary to correct this error.

This final rule amends § 91.105 (§ 91.155 effective August 18, 1990) by adding paragraphs (c), (d), and (e) which were inadvertently omitted from the text published on September 29, 1989. This amendment does not alter the substantive provisions of § 91.105, but simply continues in effect the basic provisions of that section in effect prior to September 29, 1989.

## Need for Immediate Adoption

Since this amendment only corrects a publication error and does not substantively amend agency regulations, this action is a minor technical amendment in which the public would not be particularly interested. Accordingly, I find that notice and public comment procedures are unnecessary. I further find that good cause exists for making the amendment effective in less than 30 days to eliminate ambiguity in published agency regulations as soon as possible.

## List of Subjects in Part 91

Aviation safety, Air traffic control, Flight visibility, Traffic pattern, Visual flight rules.

## The Amendment

For the reasons set forth above, part 91 of the Federal Aviation Regulations (14 CFR part 91) is amended as follows:

## PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The Authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 (as amended by Pub. L. 100-223), 1422 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

The following amendments are made to part 91 in effect as of the effective date of this amendment:

2. Section 91.105 is amended by adding paragraphs (c), (d) and (e) to read as follows:

## § 91.105 Basic VFR weather minimums.

(c) Except as provided in § 91.107, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone beneath the ceiling when the ceiling is less than 1,000 feet.

(d) Except as provided in § 91.107, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone—

(1) Unless ground visibility at that airport is at least 3 statute miles; or

(2) If ground visibility is not reported at that airport, unless flight visibility during landing or takeoff, or while operating in the traffic pattern, is at least 3 statute miles.

(e) For the purposes of this section, an aircraft operating at the base altitude of a transition area or control area is considered to be within the airspace directly below that area.

The following amendment is made to part 91 in effect as of August 18, 1990:

3. Section 91.155 is amended by revising paragraphs (c), (d) and (e) to read as follows:

## § 91.155 Basic VFR weather minimums.

(c) Except as provided in § 91.157, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone beneath the ceiling when the ceiling is less than 1,000 feet.

(d) Except as provided in § 91.157, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone—

(1) Unless ground visibility at that airport is at least 3 statute miles; or

(2) If ground visibility is not reported at that airport, unless flight visibility during landing or takeoff, or while operating in the traffic pattern, is at least 3 statute miles.

(e) For the purposes of this section, an aircraft operating at the base altitude of a transition area or control area is considered to be within the airspace directly below that area.

Issued in Washington, DC on July 13, 1990.

James B. Busey,

Administrator.

[FR Doc. 90-16880 Filed 7-18-90; 8:45 am]

BILLING CODE 4910-13-M

# Reader Aids

Federal Register

Vol. 55, No. 139

Thursday, July 19, 1990

## INFORMATION AND ASSISTANCE

### Federal Register

Index, finding aids & general information	523-5227
Public inspection desk	523-5215
Corrections to published documents	523-5237
Document drafting information	523-5237
Machine readable documents	523-3447

### Code of Federal Regulations

Index, finding aids & general information	523-5227
Printing schedules	523-3419

### Laws

Public Laws Update Service (numbers, dates, etc.)	523-6641
Additional information	523-5230

### Presidential Documents

Executive orders and proclamations	523-5230
Public Papers of the Presidents	523-5230
Weekly Compilation of Presidential Documents	523-5230

### The United States Government Manual

General information	523-5230
---------------------	----------

### Other Services

Data base and machine readable specifications	523-3408
Guide to Record Retention Requirements	523-3187
Legal staff	523-4534
Library	523-5240
Privacy Act Compilation	523-3187
Public Laws Update Service (PLUS)	523-6641
TDD for the deaf	523-5229

## FEDERAL REGISTER PAGES AND DATES, JULY

27171-27440	2
27441-27626	3
27627-27798	5
27799-28012	6
28013-28142	9
28143-28368	10
28369-28590	11
28591-28744	12
28745-28876	13
28877-29000	16
29001-29180	17
29181-29338	18
29339-29552	19

## CFR PARTS AFFECTED DURING JULY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

### 1 CFR

460	27633
461	27633

### 3 CFR

Proclamations:	
5805 (Amended by Proc. 6152)	27441
6142 (Amended by Proc. 6152)	27441
6151	27171
6152	27441
6153	27447
6154	27449
6155	27799
6156	28367
6157	29179
Executive Orders:	
12718	27451
12719	29001
12720	29337
Administrative Orders:	
Presidential Determinations:	
No. 90-19 of April 26, 1990	27627
No. 90-23 of June 21, 1990	27629
No. 90-24 of June 21, 1990	27631
No. 90-28 of July 3, 1990	27797
Memorandums:	
June 6, 1990	27453

946	28750
947	28143
989	28016
1230	29340
1434	29181
1435	29181
1962	28370
Proposed Rules:	
29	27249
51	28032
246	28033
340	28637
927	28917
931	28048
945	28214
958	27825
967	29025
980	28049
981	29026
982	28050
987	28215
989	28051
993	29027
998	29028
999	28050
1001	28403, 28918, 29034
1002	28403, 28918, 29034
1004	28052, 28403, 28918, 29034
1005	28403, 29034
1006	28403, 29034
1007	28403, 28767, 29034
1011	28403, 29034
1012	28403, 29034
1013	28403, 29034
1030	28403, 29034
1032	28403, 29034
1033	28403, 29034
1036	28403, 29034
1040	28403, 29034
1044	28403, 29034
1046	28403, 29034
1049	28403, 29034
1050	28403, 29034
1064	28403, 29034
1065	28403, 29034
1068	28403, 29034
1075	28403, 29034
1076	28403, 29034
1079	28403, 29034
1093	28403, 29034
1094	28403, 29034
1096	28403, 29034
1097	28403, 29034
1098	28403, 29034
1099	28403, 29034
1106	28403, 29034
1108	28403, 29034
1120	28403, 29034
1124	28403, 29034
1126	28403, 29034
1131	28403, 29034
1132	28403, 29034

### 5 CFR

315	29339
430	27760, 27933
831	29339
1209	28591
1301	28745
1312	28745
2637	27179, 27330, 27933
2638	27179
Proposed Rules:	
317	28632
359	28632
842	28632
2502	29219

### 7 CFR

2	28369
51	28748
301	27180, 28595, 28596
400	27182
910	27182, 28013, 28877
911	28015
916	27801
917	27801
918	28748
928	27184
929	28749

1134.....28403, 29034	39.....27200, 27330, 27457,	341.....27806	925.....27811
1135.....28403, 29034	27458, 27803-27805, 28179,	610.....28380	926.....28022
1137.....28403, 29034	28183, 28600, 28602, 28753,	1316.....27464	<b>Proposed Rules:</b>
1138.....28403, 29034	28886, 29003-29011, 29195-	<b>Proposed Rules:</b>	75.....28062
1139.....28403, 29034	29193, 29342-29351	58.....27476	710.....27588
1900.....28057	71.....27460, 28184, 28187	101.....29456-29517	901.....27255
1901.....28057	73.....28188, 28604	103.....27831	916.....28777
1910.....28057	91.....29552	104.....29476	926.....28062, 28414
1944.....28057	97.....28188, 29012	105.....29487	935.....27256, 28779
1951.....29032	135.....29352	333.....29453	<b>31 CFR</b>
<b>8 CFR</b>	1263.....28370	878.....29223	540.....28613
103.....29342	<b>Proposed Rules:</b>	<b>22 CFR</b>	<b>32 CFR</b>
299.....29342	Ch. I.....28655, 29062	42.....29014	199.....27633
<b>Proposed Rules:</b>	39.....27470-27473, 27826-	<b>Proposed Rules:</b>	286h.....28614
214.....28767	27829, 28217, 28226, 28656,	1102.....28407	289.....27225
274a.....28767	29062, 29064, 29378-29387	<b>23 CFR</b>	350.....28193
<b>9 CFR</b>	71.....27474, 28227, 28228,	<b>Proposed Rules:</b>	706.....27817, 27818, 29199
3.....28679	28774, 29065-29067, 29222	630.....27250	<b>Proposed Rules:</b>
78.....28598	75.....28775	1327.....27251	299a.....27835
94.....29003	<b>15 CFR</b>	<b>24 CFR</b>	<b>33 CFR</b>
<b>Proposed Rules:</b>	8b.....29318	50.....27598	4.....27226
3.....28638	771.....27760, 28865	200.....27218	100.....27820, 28616, 28618,
308.....28770	774.....27760	203.....27218	28758
318.....28770	779.....27760	570.....29296	110.....27464
320.....28770	786.....27760	882.....28538, 28607	146.....27226
381.....28770	787.....27760	885.....27223	165.....28194, 28759
<b>10 CFR</b>	799.....27760	887.....28538	325.....27821
50.....29181	<b>Proposed Rules:</b>	961.....27598, 28987	<b>Proposed Rules:</b>
72.....29181	30.....28404	<b>Proposed Rules:</b>	88.....29229
170.....29181	<b>16 CFR</b>	888.....27251, 28413, 28776	117.....28233, 29068, 29388
<b>Proposed Rules:</b>	305.....28754	3282.....27252	<b>34 CFR</b>
2.....27645, 29043	<b>17 CFR</b>	<b>25 CFR</b>	768.....28989
35.....29378	30.....28372	<b>Proposed Rules:</b>	769.....28989
50.....29043	229.....27933	175.....28229	771.....28989
54.....29043	230.....27933	176.....28229	772.....28989
60.....28771	239.....27933	177.....28229	<b>Proposed Rules:</b>
<b>12 CFR</b>	240.....27933	<b>26 CFR</b>	445.....28138
208.....27762	249.....27933	1.....28021	<b>36 CFR</b>
225.....27762	401.....27461, 29293	301.....28608	1220.....27422, 27426
337.....28884	<b>18 CFR</b>	602.....28021	1222.....27422, 28136
545.....28144	37.....29352	<b>Proposed Rules:</b>	1224.....27422
563.....27185, 28144, 29453	<b>19 CFR</b>	1.....27598, 27648, 28061,	1228.....27426, 28136
563b.....27185	11.....28190	29224	1230.....27434
613.....28511, 28885	12.....28191	602.....28061	<b>37 CFR</b>
614.....28511, 28885	101.....29013	<b>27 CFR</b>	301.....28196
615.....28511	134.....28190	<b>Proposed Rules:</b>	306.....28196
616.....28511	148.....28755	9.....27652	<b>38 CFR</b>
618.....28511	158.....28190	<b>28 CFR</b>	21.....27821, 28023, 28362,
619.....28511, 28885	159.....28190	0.....27808, 28610, 28908	28511
<b>Proposed Rules:</b>	162.....28755	<b>29 CFR</b>	36.....27465
5.....27964	<b>20 CFR</b>	1952.....28610	<b>Proposed Rules:</b>
8.....27964	416.....28373, 28377	2610.....27808, 28756	3.....28234
11.....27964	655.....29356	2622.....28756	21.....27836
16.....27964	701.....28604	2676.....28757	<b>40 CFR</b>
225.....28216	702.....28604	<b>Proposed Rules:</b>	52.....27226, 28197, 28622,
611.....28639	703.....28604	504.....27974	28624, 29200, 29203
<b>13 CFR</b>	704.....28604	1910.....28728, 29150, 29224	60.....28393, 29015
107.....28166	718.....28604	1915.....28728	61.....28346, 28393, 29205
120.....27197	722.....28604	1917.....28728	81.....28199
121.....27198	725.....28604	1918.....28728	180.....28619, 28621, 28780
123.....28752	726.....28604	1926.....28728	228.....27634
<b>Proposed Rules:</b>	727.....28604	1928.....28728	259.....27228
121.....27249, 28773, 28774	<b>Proposed Rules:</b>	<b>30 CFR</b>	261.....29017-29020, 29359
<b>14 CFR</b>	621.....27974	736.....29536	271.....28028, 28997
13.....27547, 29293	655.....27974	750.....29536	<b>Proposed Rules:</b>
21.....28170, 28599	<b>21 CFR</b>	901.....27224	52.....27657, 27659, 28781
23.....28599	168.....28019		144.....29869
25.....28170	178.....28020		
	201.....27776		
	314.....28378		

146	29069
148	27659, 28415
180	28657
228	28235
260	29230
268	27659, 28415
270	29230
280	27837
281	27837
721	27257, 28063
763	29069

**43 CFR**

17	28909
<b>Public Land Orders:</b>	
4176 (Partial Revocation)	27822
5180 (Amended by PLO 6787)	29360
5184 (Amended by PLO 6787)	29360
6784	27467
6785	27822, 29293
6786	27822
6787	29360
<b>Proposed Rules:</b>	
5470	27477

**44 CFR**

64	28205
206	28625
<b>Proposed Rules:</b>	
67	28659, 28660, 29233
72	29389

**45 CFR**

801	29206
1340	27638
<b>Proposed Rules:</b>	
641	28236

**46 CFR**

502	28398
587	28398
<b>Proposed Rules:</b>	
503	29071

**47 CFR**

1	28912
2	28627, 28760
15	28760
64	27467, 27468, 28915, 29022
68	28628, 28762
73	28400, 28401, 28912, 29361
87	28627
90	28028
<b>Proposed Rules:</b>	
1	27478, 28063
68	28660, 28781
73	28240, 28242, 28418, 28918, 29390, 29391
87	28243

**48 CFR**

507	28630
1602	27405
1615	27405
1616	27405
1622	27405
1632	27405
1652	27405
4409	28208
4415	28206

4416	28206
4419	28206
4426	28206
4433	28206
4452	28206

**Proposed Rules:**

208	27268
211	28514
225	27268
252	27268, 28514
516	28248
517	28246
523	27839
546	27839
552	27839, 28246

**49 CFR**

173	27640
179	27640
<b>Proposed Rules:</b>	
40	28782
198	28419
395	27844
571	27330, 29238
1043	28920
1057	28419
1058	28419
1084	28920

**50 CFR**

17	28209, 29361
18	28764
228	28764, 29207
640	28631
642	29370
646	28916
658	28402
672	27643, 29023
674	29216
675	27643, 27823
<b>Proposed Rules:</b>	
17	27270, 27662, 28570, 28577, 28665, 29072
20	28352, 29146
611	28247
646	28066, 29075
651	28786
662	28787
663	28247
669	28787
674	28661, 28789
683	27479
685	27481

**LIST OF PUBLIC LAWS****Last List July 18, 1990**

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

**H.R. 1028/Pub. L. 101-332**

Mount Rushmore Commemorative Coin Act. (July 16, 1990; 104 Stat. 313; 3 pages) Price: \$1.00

**H.R. 4252/Pub. L. 101-333**

To authorize the Secretary of the Air Force to purchase certain property at Pease Air Force Base, New Hampshire. (July 16, 1990; 104 Stat. 316; 2 pages) Price: \$1.00

**H.R. 4525/Pub. L. 101-334**

Ethics in Government Act Amendment of 1990. (July 16, 1990; 104 Stat. 318; 1 page) Price: \$1.00

# Public Laws

are now available for the 101st Congress, 2nd Session, 1990

Pamphlet prints of public laws, often referred to as slip laws, are the initial publication of Federal laws upon enactment and are printed as soon as possible after approval by the President. Legislative history references appear on each law. Subscription service includes all public laws, issued irregularly upon enactment, for the 101st Congress, 2nd Session, 1990.

(Individual laws also may be purchased from the Superintendent of Documents, Washington, DC 20402-9328. Prices vary. See Reader Aids Section of the Federal Register for announcements of newly enacted laws and prices).

## Superintendent of Documents Subscriptions Order Form

Order Processing Code

\* 6216

**Charge your order.  
It's easy!**



☐ **YES,** please send me \_\_\_\_\_ subscriptions to **PUBLIC LAWS** for the 101st Congress, 2nd Session, 1990 for \$107 per subscription.

1. The total cost of my order is \$\_\_\_\_\_. All prices include regular domestic postage and handling and are subject to change. International customers please add 25%.

Please Type or Print

2. \_\_\_\_\_  
(Company or personal name)

(Additional address/attention line)

(Street address)

(City, State, ZIP Code)

( )

(Daytime phone including area code)

3. Please choose method of payment:

☐ Check payable to the Superintendent of Documents☐ GPO Deposit Account    -☐ VISA or MasterCard Account[illegible]

(Credit card expiration date) *Thank you for your order!*

(Signature) 1/9

1/90

4. Mail To: Superintendent of Documents, Government Printing Office, Washington, D.C. 20402-9371

